APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6902

LONNIE GOODING,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1973
CERTIORARI GRANTED OCTOBER 15, 1973

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6902

LONNIE GOODING,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 667-71

UNITED STATES OF AMERICA

v.

LONNIE GOODING

RELEVANT DOCKET ENTRIES

April 6, 1971	Presentment and indictment filed (2 counts).
April 22, 1971	ARR: PNG: Pretrial is set for 5-12-71 at 4:15 P.M. Bond. GESELL, J. Rep. I. Watson, J. Finkelstein for arr. only.
April 28, 1971	APPEARANCE of Herbert A. Rosenthal as COURT APPOINTED COUNSEL for Deft. BURNETT, M.
May 3, 1971	MOTION to suppress evidence and to dismiss and P&A.
June 2, 1971	Hearing on Motion begun and cont'd until 6-3-71 at 2:30 P.M., Bond. GESELL, J., Rep I. Watson, H. Rosenthal, Atty.
June 3, 1971	Hearing on motions concluded & taken under advisement. GESELL, J. Rep I. Watson. H. A. Rosenthal, Atty.
June 11, 1971	AFF FP & ORDER dated 6/4/71 Apptg. Herbert A. Rosenthal & leave to proceed fp. NUNC PRO TUNC APRIL 22, 1971. GESELL, J.

RELEVANT DOCKET ENTRIES

June 14, 1971	Memorandum Opinion and Order Granting motion of defendant to Suppress Evidence. GESELL, J. (Signed 6-11-71).
July 12, 1971	Notice of Appeal from order granting deft's motion to suppress evidence (Government).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1669

UNITED STATES OF AMERICA,

Appellant

vs.

LONNIE GOODING

RELEVANT DOCKET ENTRIES

August 20, 1971	Certified Original Record (1 Volume Transcript pp. 1-71)
August 30, 1971	Motion for continuation of appointment
September 2, 1971	Order per CJ Bazelon appointing Herbert A. Rosenthal, Esq. as counsel to represent appellee's extending time to file brief to 30 days from the date appellant's brief is filed.
September 29, 1971	Appellant's brief
October 28, 1971	Appellee's brief
November 10, 1971	Appellant's motion for leave to file motion to extend time to file brief.
November 15, 1971	Clerk's order granting appellant's motion for leave to file motion to extend time to file reply brief and extending time to November 16th
November 16, 1971	Appellant's reply brief
April 17, 1972	Appellee's motion to dismiss appeal
April 24, 1972	Appellant's opposition to motion to dismiss appeal
May 2, 1972	Per Curiam order denying appellee's motion to dismiss appeal; the appendix of the parties shall be filed by May 16th and appellant's printed brief by May 23rd. CJ Bazelon and Robb, CJ

Relevant Docket Entries

May 10, 1972	Appendix Filed
May 17, 1972	Appellant's printed brief Filed
May 17, 1972	Appellant's printed reply brief filed
May 24, 1972	Appellee's brief filed
August 1, 1972	Appellant's motion to advance case, for oral argument
September 6, 1972	Per Curiam order granting appellant's motion to advance case for oral argument and Clerk is directed to schedule this case for argument on the merits as promptly as the business of the Court permits; Leventhal and Wilkey, CJ
October 25, 1972	Argued before Fahy, Sr. CJ, Robinson and Wilkey, CJ
March 26, 1973	Opinion by Circuit Judge Wilkey.
March 26, 1973	Concurring opinion by Senior Circuit Judge Fahy.
March 26, 1973	Concurring opinion by Circuit Judge Robinson.
March 26, 1973	Judgment reversing & remanding cases to the District Court.
April 6, 1973	Appellee's motion for stay of mandate
April 6, 1973	Appellee's petition for rehearing and suggestion for rehearing en banc
May 11, 1973	Per Curiam order denying appellee's petition for rehearing; Fahy, Sr. CJ; Robinson and Wilkey, CJ
May 11, 1973	Letter sent to counsel that no judge requested a vote on suggestion for rehearing en banc and no action will be taken on said petition.
May 11, 1973	Per Curiam order denying appellee's motion for stay of mandate; Fahy, Sr. CJ; Robinson and Wilkey, CJ.

APPLICATION FOR SEARCH WARRANT

D11-448-71 CR

[Received Mar. 8, 1971. James F. Davey, Clerk]

UNITED STATES MAGISTRATE
Room No. 1476
U. S. District Court Building
Washington, D. C. 20001

Please issue (search) warrant for 1419 Chapin Street, N.W., last apt, on the right next to elevator on the first floor. Violation: U.S.C.; Title 26. Sections: 4704a.

/s/ Donald E. Campbell
DONALD E. CAMPBELL
Assistant U. S. Attorney

DATE 2/11/71

Bond: $2,500

Affidavit for
Search Warrant

UNITED STATES DISTRICT COURT
FOR THE

.....

Magistrate's Docket No. 11
Case No. 448-71 CR

UNITED STATES OF AMERICA

vs.

1419 CHAPIN STREET, N.W., as you enter the building last apartment on the right next to the elevator on the first floor.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE LAWRENCE S. MARGOLIS, Wash., D.C. The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) 1419 Chapin Street, N.W., as you enter the building last apartment on the right next to the elevator on the first floor Washington in the District of Columbia there is now being concealed certain property, namely heroin, syringes, tourniquets, cookers and paraphernalia used in the preparation of heroin for retail and any other paraphernalia used in the preparation and dispensation of heroin and any other narcotic drugs illegally held, which are in violation of Title 26 U.S. Code Section 4704 (a).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: See the facts set forth in the affidavit attached hereto and made a part hereof!

/s/ Marion L. Green
MARION L. GREEN
MPD

Sworn to before me and subscribed in my presence Feb. 11, 1971.

/s/ Lawrence S. Margolis
LAWRENCE S. MARGOLIS
U.S. Magistrate

AFFADAVIT [SIC] IN SUPPORT OF A REQUEST FOR A UNITED STATES MAGISTRATE'S SEARCH WARRANT FOR VIOLATION OF THE NARCOTIC LAWS OF THE UNITED STATES CODE, TITLE 26, SECTION 4704a

SEARCH WARRANT: For, 1419 Chapin Street, N.W., as you enter the building, last apartment on the right next to the elevator on the first floor. (no visible number)

CHARGES: Harrison Narcotic Act

I, the undersigned officer who is assigned to the Third District Vice Squad, Metropolitan Police Department, and working in the city of Washington D.C. in an undercover capacity where illegal drugs are sold and possessed in violation of the United States Code, Title 26, Section 4704a. Had the occasion to investigate the following offense.

On February 9, 1971, I, the undersigned officer was contacted by a reliable source of information who has proven to be reliable in the past. By making narcotic buys that has led to the arrest and convictions of numerous narcotic violator's. That a negro male by the name of Lonnie Gooding were selling narcotic drugs out of his apartment at 1419 Chapin Street N.W. The source further stated that it could purchase narcotics from the subject called Lonnie Gooding. And it had purchased narcotic within the past week.

On February 9, 1971, I, the undersigned officer along with Officer Ted Williams who is also assigned to the Third District Vice Squad meet the source in the 1300 Blk. Vermont Avenue N.W. At which time I searched it in the presence of Officer Ted Williams and found it to be free of narcotics and money. I then drove the source in my private auto along with Officer Ted Williams to the 1400 Block Chapin Street N.W. and at which time I gave it advanced M.P.D.C. Funds to make the narcotic purchase. I then observed the source go inside 1419 Chapin St. N.W. and go to the last apartment on the right next to the elevator on the first floor and knock on

the door. At which time he was admitted by a negro male, dark complexion, 5'10", 150 lbs. After spending a few minutes inside the apartment the source returned to where I was waiting in the hallway and handed to me a tin foil wrapper. The source then told me that the subject that opened the door was Lonnie Gooding. The source further stated that Lonnie Kept the narcotic in a lady green handbag. I then drove the source back to the 1300 Block Vermont Avenue N.W. where I again searched it and found it to be free of money and narcotics. During the process of going and returning from the apartment the source was kept in my vision.

I then returned to the Third District Vice Squad office where I turned the tin foil wrapper containing white powder over to Detective W.E. Larman of the Narcotic Squad. At which time he performed a preliminary field test in my presence on a portion of the white powder. And a color reaction indicated that it was of the opiate group.

Further Police investigation by the undersigned officer reveal that Lonnie Gooding, DOB: 2-8-42, M.P.D.C. ID #189-098 was convicted and sentenced to one to four (1-4) years in 1966 for narcotic violation and again on 3-6-70 for narcotic violation which is presently pending in the Grand Jury Section of the United States Courts. From the reported events in this affidavit along with the investigation that was personally made by me. I am positive that Lonnie Gooding is secreting narcotics inside his apartment at 1419 Chapin Street NW in violation of the US Code.

/s/ Marion L. Green Jr.
PLC. MARION L. GREEN JR.
Third District Vice Squad

Subscribed to and sworn before me this 11 day of February 1971.

/s/ Lawrence S. Margolis
United States Magistrate's
For District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Commissioner's Docket No. 11

Case No. 448-71 CR

UNITED STATES OF AMERICA

vs.

1419 Chapin Street, N.W., as you enter the building, last apartment on the right next to the elevator on the first floor

SEARCH WARRANT

To Chief of Police or any Member of MPDC

Affidavit having been made before me by Plc. Marrion L. Green, Jr. Third District Vice Squad that he (has reason to believe) that (on the premises known as) 1419 Chapin Street, N.W., as you enter the building last apartment on the right next to the elevator on the first floor, Washington in the District of Columbia, there is now being concealed certain property, namely heroin, capsules, envelopes, syringes, tourniquets, cookers and paraphernalia used in the preparation of heroin for distribution or use and any other instrumentalities or evidence of illegal possession or dispensation of heroin or of any other narcotic drugs illegally held. See the facts set forth in the affidavit attached hereto and made a part hereof which are in violation of Title 26 Section 4704(a) of the U.S. Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day

or night [1]) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this day of Feb. 11, 1971

/s/ Lawrence S. Margolis
U. S. Commissioner

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

RETURN

I received the attached search warrant February 11, 1971, and have executed it as follows:

On February 12, 1971 at 9:30 o'clock PM, I searched the premises described in the warrant and

I left a copy of the warrant with Lonnie Gooding together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

7 tinfoil decks containing a white powder
A quantity of narcotic paraphernalia
Seven hypodermic needles
One bottle cap cooker w/white powder
One empty bottle cap cooker
One tourniquet
One measuring spoon
One cut card
One strainer

This inventory was made in the presence of Lonnie Gooding, Marion L. Green and Floyd Patterson, Robert Polzin.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Marion L. Green

Subscribed and sworn to and returned before me this 16th day of February, 1971.

/s/ Lawrence S. Margolis
U. S. Magistrate

INDICTMENT

[Filed April 6, 1971]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on February 1, 1971

Criminal No. 667-71

Grand Jury No. 362-71

THE UNITED STATES OF AMERICA

v.

LONNIE GOODING

Violation: 26 U.S.C. 4704(a), 21 U.S.C. 174 (Possession of Narcotic Drugs Not in Original Stamped Package; Receipt and Concealment of Narcotic Drugs, Knowing Same to Have Been Imported Contrary to Law)

The Grand Jury charges:

FIRST COUNT:

On or about February 12, 1971, within the District of Columbia, Lonnie Gooding purchased, dispensed and distributed not in the original stamped package and not from the original stamped package, a narcotic drug, that is, seven pieces of foil containing a mixture totaling about 4,380 milligrams of heroin, and other substances; and one cooker containing a mixture totaling about 860 milligrams of heroin, and other substances.

SECOND COUNT:

On or about February 12, 1971, within the District of Columbia, Lonnie Gooding received, concealed and

facilitated the concealment of a narcotic drug, that is, seven pieces of foil containing a mixture totaling about 4,380 milligrams of heroin, and other substances; and one cooker containing a mixture totaling about 860 milligrams of heroin, and other substances, after said heroin had been imported into the United States contrary to law, with the knowledge of Lonnie Gooding. This is the same heroin which is mentioned in the first count of this indictment.

/s/ Thomas A. Flannery
Attorney of the United States
in and for the District of
Columbia

A TRUE BILL:

/s/ John H. Merriam, Jr.
Foreman

[Filed May 3, 1971]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 667-71

UNITED STATES OF AMERICA

v.

LONNIE GOODING

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT

Defendant Lonnie Gooding, through counsel, hereby moves the Court to dismiss the indictments and to suppress the use in evidence against him in any criminal proceeding seven tin foil packets allegedly containing heroin, a quantity of white powder allegedly heroin, plus various narcotics paraphernalia and their contents. These tangible items were found on the person of the defendant or in his apartment on February 12, 1971.

The tangible objects should be suppressed because:

1. The search warrant was executed at night but the application for the warrant did not comply with the D. C. Code provisions for nighttime search warrants;
2. The officers entered the apartment without knocking and waiting but did not have a "no-knock" warrant or grounds for not knocking;
3. The police had no probable cause to search the person of the defendant; and
4. For other reasons which may appear at the oral hearing hereon.

The indictment should be dismissed because:

1. The narcotics and narcotics paraphernalia found on the person of the defendant and in his apartment were for his own use as a non-trafficking addict;

2. The difference in mandatory minimum penalties for persons indicted prior to May 1, 1971, and those after that date is a denial of due process and equal protection of the laws and is a cruel and unusual punishment;

3. And for other reasons which may appear at the oral hearing hereon.

WHEREFORE, defendant Lonnie Gooding prays that the Court dismiss the indictments against him and suppress the use in evidence against him of the aforementioned items in any criminal proceeding.

Respectfully submitted,

/s/ Herbert A. Rosenthal
HERBERT A. ROSENTHAL
921 Cafritz Building
Washington, D. C. 20006
466-2030
Attorney for Defendant

[Certificate of Service Omitted]

[Filed June 14, 1971]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 667-71

UNITED STATES OF AMERICA

v.

LONNIE GOODING

MEMORANDUM AND ORDER

Defendant is charged with possession of heroin and narcotics paraphernalia in violation of 21 U.S.C. § 174 and 26 U.S.C. § 4704(a). He has moved to suppress the physical evidence seized pursuant to Magistrate's Search Warrant No. D 11-448-71CR, on the grounds that the warrant was executed in the nighttime in violation of 23 D.C. Code § 523(b), which reads as follows:

> A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant pursuant to section 23-521(f)(5), shall be executed only during the hours of daylight.

Section 23-521(f)(5) provides as follows:

> A search warrant shall contain—
>
> * * * *
>
> (5) a direction that the warrant be executed during the hours of daylight or, where the judicial officer has found cause therefor, including one of the grounds set forth in section 23-522(c)(1), an authorization for execution at any time of day or night . . . .

Section 23-522(c)(1) sets forth the grounds for permitting execution of a warrant during the nighttime:

> The application may also contain—

> (1) a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances . . . .

The above provisions were added to the D.C. Code by the District of Columbia Court Reform and Criminal Procedure Act of 1970, and became effective February 1, 1971. The warrant was issued by a United States Magistrate on February 11, 1971, and executed by the Metropolitan Police at 9:30 P.M. on the following day. The daylight hours ended well before 9:30 P.M. on that date. None of the grounds set forth in section 23-522 (c) (1) were contained either in the application or in the warrant itself. Thus, if section 523(b) is applicable under these circumstances, the seizure was unlawful.

The Government takes the position that the provisions cited are inapplicable to warrants issued in connection with violations of federal narcotics laws. The application for the search warrant was captioned "Affidavit in Support of a Request for a United States Magistrate's Search Warrant for Violation of the Narcotics Laws of the United States Code, Title 26, Section 4704a." The warrant also stated as grounds for issuance that the property was "in violation of Title 26 Section 4704(a) of the U.S. Code."

21 U.S.C. § 879(a) provides:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

This section, which took effect October 27, 1970, as part of the Comprehensive Drug Abuse Prevention and Control Act, replaces former 18 U.S.C. § 1405, which re-

quired the judicial officer to be satisfied only "that there is probable cause to believe that the grounds for the application exist." That earlier provision had been interpreted to allow nighttime search warrants simply upon a finding of probable cause for issuance of the warrant itself, without even the additional element of "positivity" required by Rule 41(d) of the Federal Rules of Criminal Procedure. *United States* v. *Stallings*, 413 F.2d 200 (7th Cir. 1969); *United States* v. *Tucker*, 262 F. Supp. 305 (S.D.N.Y. 1966).

Though the language of 21 U.S.C. § 879(a) suggests that Congress attempted to establish different standards for daytime and nighttime warrants, no precise requirements were spelled out in the Act, and the legislative history indicates that no change from the prior law was intended. See U.S. Code Cong. & Adm. News, 91st Cong., 2d Sess., at 4621-22 (1970). Whatever be the standards generally for issuance of a nighttime search warrant in federal narcotics cases in other parts of the country, however, the Court finds that the existence of 21 U.S.C. § 879(a) does not remove such cases from the explicit requirements for search warrants in the District of Columbia under the newly enacted Title 23, D.C. Code.

Roughly sixty percent of the search warrants issued in the District of Columbia are related to violations of the narcotics laws. If Congress had intended to except federal narcotics search warrants from the requirements of 23 D.C. Code § 523(b), one would certainly expect the intention to be expressed in the statute or at least in the legislative history, possibly by reference to the special narcotic search statute then applicable in the District for local offenses.* The Government has not

* 33 D.C. Code § 414(h), authorizing search warrants for violations of local narcotics laws, provides: "The judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night." This provision was enacted in 1956 to replace a section which required that warrants be served in the daytime "unless the affidavit is positive that the property is in the place to be searched . . . ." Curiously, no mention of this provision is to be found in the legislative history of the warrant provisions of the D.C. Criminal Procedure Act of 1970. The chief witness on behalf of the bill in the Senate hearings stated cate-

directed the Court's attention to any such indication and the Court has found none.

The criminal procedure amendments which were part of the Court Reform Act for the District of Columbia were enacted in an atmosphere of heated debate focusing on possible threats to civil liberties, and there is indication that Congress intended the special nighttime warrant provisions to be a check against unreasonable intrusions of privacy. See D.C. Code Leg. & Adm. Service, 91st Cong. 2d Sess., at 502 (1970). There is no suggestion that the intrusion of privacy is any less, or the need for nighttime warrants any greater, where narcotics offenses are involved rather than other crimes.

There is likewise no basis for finding that the D.C. Code warrant provisions are inapplicable to warrants issued in connection with federal offenses. Section 23-501 defines judicial officers, who are authorized to issue search warrants under that subchapter, to include Judges of the United States District Court and United States Magistrates. The District of Columbia Court Reform and Criminal Procedure Act of 1970 did not distinguish between local and federal prosecutions in its procedural innovations; as a result of the Act, various rules are applicable in this District Court which are not applicable in United States District Courts elsewhere in the country.*

In the absence of any indication that cases involving federal narcotics laws are excepted form the D.C. Code warrant provisions, 21 U.S.C. § 879(a) and 23 D.C. Code 523(b) may be harmonized by reading the latter as a qualification upon the former, under the principle that a special or local statute is held to modify or supersede a prior general statute on the same subject matter. See Sutherland on Statutory Construction, §§ 2022, 2023 (3d ed. 1943).

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gorically: "the District of Columbia Code presently contains no provision at all governing the time for execution of a search warrant." Hearings Before the Senate Comm. on the District of Columbia, 91st Cong., 1st Sess., pt. 4, at 1389 (1969).

* *See, e.g.*, 23 D.C. Code 1322, "Detention Prior to Trial."

As the warrant in this case did not legally authorize a nighttime search, the search was invalid and the evidence seized must be suppressed. *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

The search warrant statutes of possible application to narcotics searches in this jurisdiction are a bramblebush of uncertainties and contradictions. It is difficult if not impossible to determine the present congressional intent. This uncertainty should be clarified immediately, so that future search warrants will not be invalidated because of misunderstandings as to the applicable law. Pending prompt review of this determination or congressional action, and pending interpretation of 33 D.C. Code § 414(h) in light of the new Title 23 provisions, search warrants which are to be executed in the nighttime should comply in all respects with 23 D.C. Code § 523(b).

The motion to suppress is granted. So ordered.

/s/ Gerhard A. Gesell
United States District Judge

June 11, 1971.

[This opinion is reported at 328 F. Supp. 1005]

[Filed July 12, 1971]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 667-71

UNITED STATES OF AMERICA

v.

LONNIE GOODING

NOTICE OF APPEAL

Notice is hereby given that the United States of America appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered June 14, 1971, granting the defendant's motion to suppress evidence.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ Gregory C. Brady
GREGORY C. BRADY
Assistant United States Attorney

Counsel for defendant:

Herbert A. Rosenthal, Esquire
1625 I Street, N.W.
Washington, D. C. 20006
Telephone: 466-2030

[Filed August 20, 1971]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 667-71

UNITED STATES OF AMERICA

v.

LONNIE GOODING

CERTIFICATE OF UNITED STATES ATTORNEY

I hereby certify, pursuant to 18 U.S.C. § 3731, that the appeal herein is not taken for purpose of delay and that the evidence suppressed is a substantial proof of a fact material in this proceeding.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

[Certificate of service omitted]

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1669

UNITED STATES OF AMERICA, APPELLANT

v.

LONNIE GOODING, APPELLEE

No. 71-1945

UNITED STATES OF AMERICA, APPELLANT

v.

LEON F. BARNETT, APPELLEE [1]

Appeals from the United States District Court for the District of Columbia

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Argued October 25, 1972

Decided March 26, 1973

Guy H. Cunningham, III, Assistant United States Attorney, with whom *Thomas A. Flannery*, United States

[1] Mr. Barnett did not seek Supreme Court review of this decision.

Attorney at the time the brief was filed, *John A. Terry* and *Gregory C. Brady*, Assistant United States Attorneys, were on the brief, for appellant. *Harold H. Titus, Jr.*, United States Attorney, also entered an appearance for appellant.

Herbert A. Rosenthal, (appointed by this Court) for appellee in No. 71-1669.

James A. Treanor, III, with whom *Suzanne Meyer* (both appointed by this Court) was on the brief for appellee in No. 71-1945.

Before: FAHY, *Senior Circuit Judge*, ROBINSON and WILKEY, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* WILKEY.

Concurring opinion filed by *Senior Circuit Judge* FAHY at p. 15.

Concurring opinion filed by *Circuit Judge* ROBINSON at p. 24.

WILKEY, *Circuit Judge*: These cases arise on appeal by the United States from orders of the District Court suppressing certain evidence for use at trial on indictments for violations of the federal narcotics laws.[1] The orders of the District Court rested on the view that the evidence was seized at night pursuant to warrants which failed to meet the statutory prerequisites for nighttime execution.[2]

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[1] Both Gooding and Barnett were charged with violating former 26 U.S.C. § 4704(a) (1964), Act of 16 August 1954, ch. 736, § 4704(a), 68 Stat. 550, *repealed by* Pub. L. No. 91-513, Title III § 1101(b)(3)(A), 84 Stat. 1292 (1970). Gooding was also charged with violating former 21 U.S.C. § 174 (1964), Act of 18 July 1956, ch. 629, Title I, § 105, 70 Stat. 570, *repealed by* Pub. L. No. 91-513, Title III, § 1101(a)(2), 84 Stat. 1291 (1970).

[2] Both warrants recited facts which were characterized as "in violation of Title 26 Section 4704(a) of the U.S. Code." Both warrants further stated:

> [A]s I [the issuing magistrate] am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that

I. *The Applicable Statute*

Just which statute's requirements were applicable has been a matter of some debate. We can sympathize with U.S. District Judge Gesell's feeling that "[t]he search warrant statutes of possible application to narcotics searches in this jurisdiction are a bramblebush of uncertainties and contradictions." [3] Unfortunately, in its search for clarity, the District Court wandered into the briar patch and came to a result, in both cases, with which we cannot agree.

There are four potentially applicable standards which relate to the showing necessary before nighttime searches may be authorized. Two of these provisions deal with nighttime search as a general matter. The District of Columbia Court Reform and Criminal Procedure Act of 1970, 23 D.C. Code §§ 521-523 (Supp. V, 1972) [4] provides that a warrant may direct execution of the search at any time of the day or night on certain specified showings of need, which were admittedly not made in this case.[5]

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the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day or night [1]) . . .

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the day-time, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

The warrant in *Gooding* was executed at 9:30 p.m. on 12 February 1971, the day after its issuance. The warrant in *Barnett* was executed at 8:08 p.m. on 11 February 1971, the day it was issued.

[3] *United States* v. *Gooding*, 328 F. Supp. 1005, 1008 (D.D.C. 1971).

[4] These sections became effective as of 1 February 1971, prior to the issuance of these warrants.

[5] Section 521(f)(5) provides that the warrant shall contain a direction that it

be executed during the hours of daylight or, where the judicial officer has found cause therefor, including one of the grounds

Rule 41(c) of the Federal Rules of Criminal Procedure allowed authorization of service anytime "if the affidavits are positive that the property . . . is in the place to be searched." Since the magistrates found only probable cause, the requisite "positivity" was admittedly lacking in the cases at bar.

Two other provisions deal with nighttime search in the more limited area of offenses "involving controlled substances." Title 33 of the D.C. Code § 414(h) (1967) as amended (Supp. V, 1972) provides that, when such offenses are involved, "the judge or commissioner shall insert a direction that it may be served at any time of the day or night." However, § 414(c) arguably imposes an additional requirement that the complainant and any witnesses must be examined on oath before the warrant is issued. There is no showing that this requirement was met in these cases, so we will proceed on the assumption that § 414 would not validate the search warrants challenged here.[6]

Finally, the federal narcotics search warrant provision, 21 U.S.C. § 879(a), provides that

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> set forth in section 23-522(c)(1), an authorization for execution at any time of day or night.
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> . . .

The grounds set forth in Section 23-522(c)(1) for execution of the warrant at any time are

> . . . that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances . . . .

[6] There is also an argument that 33 D.C. Code § 414(h) was impliedly repealed since 23 D.C. Code §§ 521-523 were intended to be comprehensive and were enacted under the (albeit incorrect) assumption that "[t]he District of Columbia Code presently contains no provision at all governing the time for execution of a search warrant. H.R. Rep. No. 91-907, 91st Cong., 2d Sess. at 109 (1970). Since our conclusions concerning these warrants do not rest on the application of 33 D.C. Code § 414(h), we need not reach this issue. However, we should note that the District Court firmly rejected this argument of implied repeal in *United States* v. *Green*, 331 F. Supp. 44 (D.D.C. 1971).

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

Since none of the other statutory standards were met, these search warrants can only be held valid if § 879(a), the *specific federal* statute, is the applicable provision.[7]

Judge Gesell in *Gooding* held that the general nighttime search provisions in the D.C. Code govern and require a special showing of need to search at night even in narcotics cases. In *Barnett* Judge Corcoran agreed. The District Court's holding in *Gooding* was apparently based on the ground that a statute which is more specific and more recent should govern when conflict appears between such a statute and an older or more general law.[8] While we agree with that general principle, we disagree with its application in this case.

Although, as the District Court noted, 23 D.C. Code Sections 521-523 are more specific in the sense that they apply only to the limited geographical area of the District of Columbia, 21 U.S.C. § 879(a) is clearly the more specific or "special" provision as to *subject matter—search in narcotics cases.* Although § 879(a) went into effect before §§ 521-523, *§ 879(a)* was *considered* and *passed after* §§ 521-523.[9] Thus, the federal narcotics search statute—§ 879(a)—is in fact *both* the *more specific* and the *more recent* provision.[10]

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[7] See Part II of this opinion for a discussion of the application of § 879(a) to these warrants.

[8] 328 F. Supp. 1005, 1008.

[9] The District of Columbia Court Reform and Criminal Procedure Act of 1970, which included 23 D.C. Code §§ 521-523, was enacted on 29 July 1970 but did not become effective until 1 February 1971. The Controlled Substances Act, including 21 U.S.C. § 879, was enacted on 27 October 1970 and became effective, at least as to the provisions of § 879(a), immediately.

[10] The District of Columbia Court of Appeals came to the same

Viewed in that light, the apparent inconsistency between the general local nighttime search statute and the special federal nighttime narcotics search statute disappears.[11] Sections 521-523 of Title 23 of the D.C. Code were enacted because (1) there was no general D.C. provision relating to the time for execution of search warrants[12] and (2) Congress desired to insert criteria of "need" which were felt superior to the "positivity" test found in the Federal Rules. There is no reason to believe that narcotics searches were to be affected because, in contrast, (1) there was already a specific federal provision relating to narcotics searches (18 U.S.C. § 1405(1)), and (2) the "positivity" requirement needed no revision in regard to narcotics searches because it had not been appplied in that context.[13] When Congress *later* turned to the *specific* problem of standards governing the issuance of warrants by U.S. magistrates in narcotics cases, § 879(a) was its response to this narrower problem and that section must govern in these cases.[14]

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conclusion in *United States* v. *Thomas*, 294 A.2d 164, 166-67 (D.C.C.A.), *cert. denied*, 409 U.S. 992 (1972):

> We think it more in harmony with the obvious intent of Congress to give special treatment to narcotics law enforcement to view such provisions [as § 879(a)] as the "special" ones . . . not subject to qualification by the general search warrant provisions of the U.S. and D.C. Codes . . . . The "special" area of legislation is narcotics law enforcement, not District of Columbia law enforcement.

[11] And the "bramblebush" of statutes appears less forbidding.

[12] The possibility that Congress thought there was no D.C. provision *at all* dealing with nighttime search warrants is discussed at note 6. That fact might relate to doubts about the continuing validity of 33 D.C. Code § 414(h), although that issue does not need to be decided in this case. However, even congressional intent to enact a comprehensive nighttime search statute when it passed 23 D.C. Code §§ 521-523 would *not* serve to *negate* its *subsequent* decision to reaffirm a specific and different rule for U.S. magistrates regarding narcotics nighttime searches in regard to federal violations—by passing 21 U.S.C. § 879(a).

[13] See *United States* v. *Stallings*, 413 F.2d 200 (7th Cir. 1969), *cert. denied*, 396 U.S. 972 (1969). See footnote 22, *infra*.

[14] We have noted that, if the special local statute (33 D.C. Code § 414) is still valid, these warrants may not have met its require-

II. *Application of the Statute*

Since we conclude that § 879(a) provides the relevant tests by which to judge the validity of these search warrants, the obvious next inquiry is whether those tests were met. Appellees contend that § 879(a) requires a special showing of a need to search at night. They argue that the magistrate must be satisfied that there is probable cause to believe that grounds exist *both* "for the warrant" *and* "for its service at such time" (at any time of the day or night). The Government contends that no special showing of need is required and admit that, if it is, no such showing was made and the warrants were invalid.[15]

If appellees' interpretation of the words of the statute were the only possible reading, we would have to agree with their position. However, the requirement of probable cause to search at night does not necessarily call for a special showing of *need* for nighttime *as opposed* to daytime search. Rather, at least as natural an interpretation would imply that this added clause, "for its service at such time," requires only *grounds* for service at night in the sense that the narcotics sought will probably be present on the named property at night.[16]

Confronted with this ambiguity, we can gain guidance from the legislative history. Section 879(a) is a direct descendant of 18 U.S.C. § 1405(1).[17] Indeed, the House Report notes that

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ment of examination under oath. However, § 414 of Title 33 is concerned only with "violations of the provisions of this chapter" (*i.e.*, Chapter 4, entitled "Narcotic Drugs"—the local narcotic laws). Thus the requirements of § 414(c), which were not demonstrated to have been met by the warrants in these cases, simply do not apply here because these warrants were issued for violations of federal law.

[15] Appellant's Reply Brief at p. 2, n. 5.

[16] Section 879(a) was given this reading by the District of Columbia Court of Appeals in *United States* v. *Thomas*, 294 A.2d 164 (D.C.C.A.), *cert. denied*, 409 U.S. 992 (1972).

[17] Act of 18 July 1956, ch. 629, Title II, § 201, 70 Stat. 573, *repealed by* Pub. L. No. 91-513, Title III, § 1101(b)(1)(A), 84 Stat. 1292 (1970). This section provided, in pertinent part, that a

> Subsection (a) of this section [21 U.S.C. § 879] *incorporates* 18 U.S.C. § 1405 and authorizes service of a search warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U.S. magistrate issuing the warrant.[18]

Section 1405(1) was uniformly interpreted to require only a showing of probable cause to search in order for a warrant relating to narcotics to be executed at night.[19]

Despite the clear legislative history reflecting congressional intent not to change the prior law in this area,[20] appellees argue that the change in wording must be viewed as significant. We cannot agree. If the necessary "grounds . . . for service at such time" involve more than a showing that the narcotics will be present on the premises at any time of the day or night, then presumably the additional showing required would concern a need to search at night. Appellees argue as much by suggesting that § 879(a) incorporates the standards set forth in the general D.C. nighttime search provision. However, the exact wording of § 879(a) was proposed by the Justice Department. It is inconceivable that, confronted with a crescendoing nationwide drug abuse problem, the Department would recommend to Congress a statute making the

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"search warrant [relating to narcotics offenses] may be served at any time of the day or night if the judge of United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist."

[18] H.R. Rep. No. 91-1444 (Part I), 91st Cong., 2d Sess. 54 (1970) (emphasis added). See U.S. Code Cong. Adm. News, 91st Cong., 2d Sess., at pp. 4621-22 (1970). Exactly the same language is contained in the Senate Report S. Rep. No. 91-613, 91st Cong., 1st Sess. 30-31 (1969).

[19] *United States* v. *Stallings*, 413 F.2d 200, 207 (7th Cir. 1969), *cert. denied*, 396 U.S. 972 (1969); *United States* v. *Castle*, 213 F. Supp. 52 (D.D.C. 1962); *United States* v. *Tucker*, 262 F. Supp. 305 (S.D.N.Y. 1966).

[20] In *Gooding*, Judge Gesell conceded that "the legislative history [of 21 U.S.C. § 879(a)] indicates that no change from the prior law was intended. 328 F. Supp. 1005, 1007.

obtaining of nighttime search warrants just as difficult for narcotics offenses as in any other case.[21]

If we accepted appellees' argument that the federal statute's requirements for nighttime search in narcotics cases are precisely coterminous with those of the local statute which applies in all types of cases, then whatever distinction Congress sought to establish by enacting a *separate and special* statute regarding federal narcotics offenses would be completely *obliterated.* And since we are construing a federal statute, that construction would be of uniform national application. On the other hand, if appellees concede that § 879(a) does set up its own federal standard, and if the showing required is *less* than that set out in 23 D.C. Code §§ 521-523, but *more* than mere probable cause to believe that the drugs will be found "at such time," then *no source for the applicable standard appears.*

Appellees are essentially arguing that great significance should be given to one possible reading of new language when an ambiguity is present, even when the legislative history suggests no intent to change the meaning of the section. Our refusal to follow that reasoning is fortified by the fact that the very same ambiguity was potentially present in the previous statute. Section 1405 provided that a search warrant could be served at any time if "there is probable cause to believe that grounds for the application exist." It is *possible* to read this statute to require a showing of need to search at night, since the "application" could be interpreted as seeking both (1) issuance of the warrant and (2) permission to search any time of the day or night, just as "probable cause to believe that grounds exist" (§ 879(a)) has been argued by appellees to require showings of "probable cause" and "grounds" both "for the warrant" *and* "for its service at such time."

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[21] 21 U.S.C. § 879(a) is part of the Controlled Substances Act, "legislation designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . through providing more effective means for law enforcement aspects of drug abuse prevention and control . . . ." H.R. Rep. No. 91-1444 (Part I), 91st Cong., 2d Sess. 1 (1970).

The courts, of course, refused to read § 1405 that way. They required only a showing of probable cause to believe that narcotics would be found.[22] Judges and legislators thoroughly conversant with the special, almost unique, problems of narcotics law enforcement have long recognized that effective searches for narcotics reasonably require different methods and timing. This is basically the reason that both the U.S. Code and the D.C. Code contain two distinct provisions, one for general searches, the other for narcotics searches. Deferring to "a legislative judgment that . . . special facts existed in searches concerned with federal narcotics violations," one court noted that the "conclusory statements about the need for speed and surprise that [a statutory construction parallel to the one sought by appellees here] . . . would cause to appear on affidavits for search warrants would be pointless." [23]

There is absolutely no showing that this "legislative judgment" changed in any respect during the enactment of § 879(a) to replace § 1405.[24] All the legislative history is to the contrary. Surely such a significant departure from prior policy would have drawn comment in the Senate and House Reports—especially in the context of a statutory scheme which had the overall purpose of much more stringent and effective suppression of narcotics traf-

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[22] Section 1405(1) was intended to provide an exception to the inflexible and archaic requirement of "positivity" in Rule 41(c). See S. Rep. No. 1997, 84th Cong., 2d Sess., 8-9 (1956). Rule 41(c)'s test required the affidavits to be "positive" about the fact that "the property is on the person or in the place to be searched." The new provision, § 1405(1), merely changed the degree of certainty required *as to that fact*. Ignoring a potential ambiguity, the courts wisely consulted congressional intent and found, as we do here, no desire to establish an additional required showing of need when narcotics search was involved.

[23] *United States* v. *Castle*, 213 F. Supp. 52, 53-54 (D.D.C. 1962).

[24] The District Court in *Gooding* stated that "[t]here is no suggestion that . . . the need for nighttime warrants [is] any greater where narcotics offenses are involved rather than other crimes." 328 F. Supp. 1005, 1008. That comment simply ignores the whole background and purpose of both 18 U.S.C. 1405(1) and 21 U.S.C. 879(a). See *United States* v. *Castle*, *supra*.

ficking. Since the new language cited by appellees does not even present a novel ambiguity, we must conclude that the previous meaning of the section "incorporated" in § 879(a) remained intact.

It has been argued that a greater showing of grounds to search at night was intended because § 879 applies in a comprehensive fashion to all offenses involving "controlled substances." In contrast, § 1405 applied to only certain specified narcotics offenses. Appellees suggest (without, however, pointing to any concrete evidence of such congressional intent) that a tougher standard for nighttime search was established as the *quid pro quo* in a legislative compromise extending the availability of nighttime search authorizations to a larger number of offenses. This argument proves too much. Although the "probable cause" required to be shown by § 879 *could* conceivably be characterized as ambiguous and potentially read to include probable cause to believe that special need exists to search at night, the one thing that is *clearest* about § 879 is that it is meant to apply the *same* standard for nighttime search authorizations with respect to *every* type of controlled substance.

It is true that reading § 879 to incorporate the showing previously required by § 1405 does make obtaining nighttime search warrants easier with regard to some categories of drugs. However, the *alternative reading*, espoused by appellees, *suggests* that the statute was *intended to make nighttime searches more difficult in hard narcotics cases.* As noted earlier, the Justice Department proposed the exact language of § 879. This argument from expanded coverage necessarily suggests that the *Department desired a retreat* from the test of mere probable cause to search in hard narcotics cases, and that the Department accomplished this with *no comment in the legislative history*, in the context of a *measure aimed at increasing the effectiveness of law enforcement with regard to drugs.* The Justice Department's proposals have sometimes been the subject of inaccurate interpretation and speculation, but the suggestion that the Justice Department meant to make nighttime searches

for heroin *more* difficult is indeed novel and patently off the mark.

Another attempt to suggest that the general legislative intent was compatible with a greater required showing of grounds to search at any time implies that such a showing would be quite easy in heroin cases and would thus not impede law enforcement. That argument proves too little. Since the showing required by the reading of § 879 which appellees seek is a showing of grounds to search "at such time," it must be noted that the requirement is of grounds to search "at *any* time of the day or night." That is quite different from a requirement that there be grounds to search "at night."

The statute's actual phrasing implies that the real interest required to be demonstrated is the interest in speed and surprise—grounds for search as soon as tactical considerations warrant despite the fact that the earliest possible moment may be after dark. If this showing would be easy in heroin cases, we can see no reason why it would not be just as routine in any other case involving controlled substances. Speed and surprise are equally necessary to seize any type of drug which it is generally illegal to possess. Since all controlled substances can be the subject of abuse and may have to be ferreted out in "underground" markets, there is nothing about the nature of the drug sought which renders the need for speed and surprise any less likely or any less easily shown. Therefore the expanded applicability of § 879 to a larger variety of controlled substances does not necessarily imply a departure from the standards of the previous "incorporated" section.

At worst, requiring a special showing of *need* to search "at any time of the day or night" would make nighttime search for narcotics more difficult. At best, and more probably, acceptance of appellees' arguments here would generate pointless and conclusory statements in future applications for warrants. Neither result would comport with the sound and clear legislative intent which was expressed when § 879(a) was enacted.

We hold that the applicable statute, 21 U.S.C. § 879 (a), requires only a showing of probable cause to believe

that the narcotics will be found on the premises at any time of the day or night. Since both search warrants clearly met this standard,[25] the District Court's grant of the motions to suppress in these cases must be reversed and the cases are remanded for further proceedings consistent with this opinion.

So Ordered.

FAHY, *Senior Circuit Judge, concurring*: I concur in the result reached by Judge Wilkey. I also concur generally in his opinion. In reaching the same conclusion, however, I have followed the course now stated, which is similar to but somewhat different from that adopted by Judge Wilkey.

Rule 41(c) of the F.R.Crim.P., when each of the search warrants in these cases was issued, provided as follows with respect to issuance and contents:

> The warrant shall direct that it be served in the daytime, but if the affidavits [establishing the grounds for issuing the warrant] are positive that the property is on the person or in the place to be searched, the warrant may direct that it may be served at any time . . . .

Subparagraph (g) of the Rule provided:

> This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. . . .

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[25] Both search warrants found probable cause to believe that the narcotics were being "concealed" on the relevant premises. Both incorporated affidavits which alleged that the drugs were being "secreted." In the absence of any indication that such concealment was other than continuous, the natural inference would be that they could be found on the premises at any time of the day or night. In this context, any requirement of a more specific finding by the magistrate would be an absurd linguistic artificiality which the statute does not require.

Special provision was made by former section 1405 of Title 18 of the United States Code [1] for any case involving specified violations of the federal narcotics laws.[2] *U.S.* v. *Stallings*, 413 F.2d 200 (7th Cir.), *cert. denied*, 396 U.S. 972 (1969); *U.S.* v. *Tucker*, 262 F.Supp. 305 (S.D.N.Y. 1966). In such cases section 1405(1) provided:

> a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist. . . .

The Managers on the part of the House, in referring to section 1405, stated that the restrictions governing the issuance of night search warrants are thus liberalized with respect to specified laws relating to narcotic drugs and marijuana, "so that a search warrant may be issued in any such case at any time of the day or night if the judge or the United States Commissioner is satisfied that there is probable cause to believe that the grounds for the application exist." *H.R.Rep.* No. 2546, 84th Cong., 2d Sess., 16 (1956). The "positiveness" requirement of Rule 41(c) was referred to as inflexible and archaic, giving the peddler a distinct advantage over law enforcement forces and hampering efforts to deal with narcotics racketeering. *S.Rep. No.* 1997, 84th Cong., 2d Sess., 8-9 (1956). The Report continues: "the element of 'positiveness' [of Rule 41] is no longer required and 'probable cause' alone is enough to obtain a night search warrant in narcotics cases . . . ." *Id.* at 9.

The "positiveness" previously required of the affidavits by Rule 41(c) was that "the property is on the person or in the place to be searched," as to which, under sec-

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[1] Act of July 18, 1956, ch. 629, Title II, § 201, 70 Stat. 573, *repealed by* P.L. 91-513, Title III, § 1101(b)(1)(A), 84 Stat. 1292 (1970).

[2] Such provisions included former sections 174 and 184(a) of Title 21 of the United States Code, and related violations of the Internal Revenue Code.

tion 1405(1), the issuing judge or commissioner need have only "probable cause" to believe.

21 U.S.C. § 879(a), has now superseded section 1405 (1). It provides as follows:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

This enactment I construe to be a restatement or interpretation of section 1405(1). It clarifies the meaning of that section, which had relieved search warrants for narcotics of the positivity requirement of Rule 41 (c), substituting a probable cause requirement for a search at any time, thus giving the "flexibility" sought by Congress in narcotics cases. It does not seem to me that this interpretation is precluded by the fact that the controlled substances covered by section 879(a) are enlarged beyond those previously within the scope of section 1405.

From the foregoing history I conclude that the requirement of section 879(a) that the issuing magistrate be "satisfied that there is probable cause to believe that grounds exist . . . for its service at such time" means, when considered with Rule 41(c) as it then read, that there is probable cause to believe that, in the case of narcotics, the "property is on the person or in the place to be searched," in which event the warrant could direct that it be served at any time. Thus, in the case of narcotics, previously under section 1405(1) and later under section 879(a), if the judge was satisfied "that there is probable cause to believe" rather than "if the affidavits are positive" that the "property is on the person or in the place to be searched," the warrant could permit execution at any time. It is in this manner I interpret the House Report, relied upon by the Government, which states:

> Subsection (a) of this section [21 U.S.C. § 879] incorporates 18 U.S.C. 1405 and authorizes service of

> a search warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U.S. magistrate issuing the warrant.[3]

Our question then, under section 879(a), is the factual one whether in each case the magistrate issuing the warrant, which authorized the search at any time of the day or night, was "satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time," i.e., "that the property is on the person or in the place to be searched." In the *Gooding* case the magistrate, referring to the facts set forth in the affidavit accompanying and made a part of the warrant, states: "I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described . . . ." The affidavit supports such a statement by the magistrate. The same is true of the situation in *Barnett*.

These search warrants accordingly have met the requirements of section 879(a).[4] The question then arises whether the searches were nevertheless invalid for failure to meet the standards for a nighttime search contained in either Title 23 or Title 33 of the District of Columbia Code.

I consider first Title 23 in its relation to Title 33. The search warrant provisions of 23 D.C. Code §§ 521-525 (Supp. V, 1972) do not refer specifically to controlled substances. They apply generally to search warrants in this jurisdiction. The warrants in the cases before us fail to meet these standards for a nighttime search, namely,

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[3] H.R.REP. No. 91-1444, 91st Cong., 2d Sess., Pt. 1 at 54 (1970) (hereinafter, H.R.REP. No. 91-1444), and like language in the Senate Report, S. REP. No. 91-613, 91st Cong., 1st Sess., 30-31 (1969).

[4] Some question may be raised about the applicability of section 879(a) in the District of Columbia in that Congress had failed specifically to include in the Act a special provision of applicability to the District of Columbia as it had done with respect to section 1405(2). I do not think the applicability of section 879(a) to this jurisdiction turns upon such a special provision, but upon the consideration advanced subsequently in this opinion.

> . . . That there is probable cause to believe (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances . . . .

23 D.C.Code § 522(c)(1) (Supp. V, 1972).

A strong argument is available that these provisions were intended by Congress to apply in this jurisdiction to controlled substances as well as generally, notwithstanding 33 D.C. Code § 414, as amended (Supp. V, 1972), applies specifically to search warrants for narcotics, and subsection (h) of section 414 provides that the warrant shall direct that it be served at any time in the day or night. In *United States* v. *Thomas*, 294 A.2d 164, *cert. denied*, 409 U.S. 992 (1972) the Court of Appeals of the District of Columbia spoke upon this matter as follows:

> We think it more in harmony with the obvious intent of Congress to give special treatment to narcotics law enforcement to view such provisions [relating to controlled substances] as the "special" ones (including D.C. Code 1967, § 33-414(h)) not subject to qualification by the general search warrant provisions of the U.S. and D.C. Codes (Rule 41(c), Federal Rules of Criminal Procedure, and § 23-522(c)(1)). The "special" area of legislation is narcotics law enforcement, not District of Columbia law enforcement . . . .

294 A.2d at 166-167.

We need not inquire whether or not we are bound by this ruling; for, that aside, I am unable to give precedence to sections 521 to 525 of Title 23 over section 414 of Title 33, insofar as the search warrants now considered are concerned. True it is that Title 33 appears to have been overlooked in the legislative history of Title 23, see the Appendix to this opinion, but I think the court cannot overlook the fact that Title 33 was nevertheless reenacted at the same session that enacted the up-to-date general search warrant provisions of Title 23. I accord-

ingly conclude that as between the two standards for a nighttime search for narcotics Title 33, section 414(h), prevails over Title 23, section 522(c)(1).

Finally, does Title 33, section 414(h), control over section 879(a)? If so, the warrants were inadequate, for section 414(c) of Title 33 was not complied with. But I am persuaded that in a search warrant for narcotics involved in an alleged violation of the federal narcotics laws, as here, section 879(a) controls, as held by the Court of Appeals of the District of Columbia in *Thomas*. I reach this conclusion, however, upon somewhat different reasoning. It is that Chapter 4 of Title 33 of our Code, of which section 414(h) is a part, entitled "Narcotic Drugs," is concerned only with violation of our local narcotics laws, that is, as section 414(h) states, "violation of the provisions of this chapter"—the District of Columbia Code chapter concerned with narcotics and defining related local crimes.

By reason of the foregoing, since the present warrants, explicitly issued in connection with the alleged violation of the federal narcotics laws, complied with section 879(a), I conclude they were valid and that the evidence seized thereunder should not have been suppressed. I reach this conclusion reluctantly. Congress recently, in providing in Title 23 of our local Code the standards generally applicable for a nighttime search in this jurisdiction, clearly differentiated between a nighttime and a daytime search. The legislative history of those provisions give strong evidence of an intention to include searches for controlled substances. Searches at night, especially of a home, present a potentially greater intrusion upon privacy. See *Jones* v. *United States*, 357 U.S. 493, 498 (1958). And no significant burden would be imposed on the magistrate or other officials by requiring special reasons for a search at night even for narcotics, particulary of a private home. These considerations have now found expression in Rule 41 itself as amended effective October 1, 1972, subsequently to the issuance of the *Gooding* and *Barnett* search warrants. The Rule now provides in its subparagraph (c) as follows:

> The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime . . . .

This provision would not have helped appellees had it been in effect when the present warrants were issued, for it is coupled with another provision, in subparagraph (h) of the new Rule, which defines the term "daytime" to mean "the hours from 6 a.m. to 10 p.m. according to local time." The *Gooding* and *Barnett* warrants were each served before 10 p.m. local time.

The salutary effect of the modification of subparagraph (c) of the Rule remains for consideration with respect to search warrants issued after its effective date. The result I reach in the present cases I think follows from the statutory situation existing when the *Gooding* and *Barnett* warrants were issued, a situation which in my opinion did not go beyond what is permissible under the Fourth Amendment.

I accordingly concur in reversal.

There is strong indication in the legislative history of 23 D.C. Code §§ 521-525 that Congress intended to apply these provisions to narcotics searches in this jurisdiction.

In revising the provisions governing Criminal Procedure for the District of Columbia Congress was advised that other than the "inadequate" positivity rule of 41(c), F.R. Crim.P., the then existing D.C. Code had no provision dealing with nighttime searches. Mr. Donald E. Santarelli, Associate Deputy Attorney General of the United States stated:

> Mr. Chairman, we have also proposed a change in the standard [41(c), F.R.Crim.P.] for nighttime search warrant. As you know, the District of Columbia Code presently contains no provision at all governing the time for execution of a search warrant . . . .
>
> * * * *
>
> We have found that the positivity rule, positivity test, is inadequate. In fact, it is relatively unfair because of the greater potential intrusion on the privacy of persons from a nighttime search. There should be some justification for that search; not merely that you are positive that the evidence is there.
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> * * * *
>
> This is for the protection of civil liberties and greater improvement over the positivity.

Hearings on S.2869, S.2602, and S.2980, Before the Senate Comm. on the District of Columbia, 91st Cong., 1st Sess., Pt. 4 at 1389 (1969) (*Hearings*). See also, Statement of Mr. Thomas A. Flannery, U. S. Attorney for the District of Columbia, *id.* at 1416.

The new provisions governing nighttime search warrants, 23 D.C. Code §§ 521-525, thus seem to have been enacted under the mistaken assumption that, notwithstanding Title 33 of the Code,

> The District of Columbia Code presently contains no provision at all governing the time for execution of a search warrant.

H.R.Rep. No. 91-907, 91st Cong., 2d Sess. at 109 (1970) (*H.R.Rep*). Moreover, the new provisions were intended to be comprehensive, *S.Rep. No.* 91-405, 91st Cong., 1st Sess. at 38-39 (1969), encompassing nighttime and no-knock searches for narcotics. See *H.R.Rep., supra*, at 109, including a statement of Mr. Charles T. Duncan, Corporation Counsel for the District of Columbia, that narcotics were a type of contraband, 23 D.C. Code § 521 (d) (2), which "may be removed or destroyed if not seized forthwith or . . . found only at nighttime." *Hearings, supra*, Statement of Mr. Santarelli, at 1404. See also the testimony of Mr. Santarelli, *id.*, at 1389-1390; the statement of Mr. Flannery, *id.*, at 1417; and the statement of Mrs. Patricia Wald of the Neighborhood Legal Services, *id.*, at 1493.

It would seem from the above that Congress may have intended the new search warrant nighttime provisions to apply in the case of narcotics. This interpretation is further supported by the reason stated by the District Court in *Gooding*:

> Roughly sixty percent of the search warrants issued [sic] in the District of Columbia are related to violations of the narcotics laws. If Congress had intended to except federal narcotics search warrants from the requirements of 23 D.C. Code § 523(b), one would certainly expect the intention to be expressed in the statute or at least in the legislative history, possibly by reference to the special narcotic search statute then applicable in the District for local offenses. The Government has not directed the Court's attention to any such indication and the Court has found none. (Footnote omitted.)

328 F.Supp. at 1007-1008.

Yet we are faced with the reenactment of Title 33, with its section 414(h), authorizing search warrants for narcotics, executed at night, without compliance with such standards as Title 23 requires generally for searches at night.

ROBINSON, *Circuit Judge*, concurring in the result: The thoughtful and excellently crafted opinions of my colleagues demonstrate convincingly that the orders appealed from cannot stand. I concur in reversal and in much of their supporting reasoning. I differ, however, with their conclusion that 21 U.S.C. § 879(a) authorizes nighttime execution of search warrants in federal narcotic cases merely on a showing of probable cause to believe that a controlled substance is then present on the person or premises to be searched. I believe, too, that the affidavits underpinning the warrants issued in the cases at bar should be credited with a larger and more crucial role in the resolution of these cases than they have yet been assigned. To accommodate these two considerations, I record this separate position.

I

At the outset, I acknowledge agreement with my colleagues that Section 879(a) set the standard for nighttime execution of the warrants before us. The careful analysis and thorough treatment which they have given this aspect of the litigation certainly needs no effort toward further elaboration. The task left for me is simply to summarize the major propositions which have persuaded me.

While the Controlled Substances Act,[1] of which Section 879(a) is a part, is not expressly made operative in the District of Columbia, it is clear that Congress intended the new law to have nationwide effect, and thus to encompass federal narcotic offenses which occur in the District.[2] I see no conflict between Section 879(a) and D.C. Code § 33-414, which also is limited to execution of search warrants in narcotics cases, since the local provisions extend only to searches based on suspected transgressions

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[1] Pub.L. No. 91-513, tit. II, 84 Stat. 1236, 1242 (1970), 21 U.S.C. §§ 801 *et seq.* (1970).

[2] The national scope of the Act is apparent from 21 U.S.C. § 801 (1970), in which congressional findings as to the interstate and intrastate aspects of traffic in narcotics are enunciated.

of the District's own drug laws.[3] Moreover, statutes which are specific as to subject matter normally prevail over those which are less particularized in their area of concern.[4] Nothing sufficient to override that principle appearing here, it follows that the federal narcotic search warrant procedures of Section 879(a) must take precedence over the general search warrant provisions of D.C. Code §§ 23-521 to 23-523 and, as well, the general service criteria set forth in Federal Criminal Rule 41(c).[5]

Our unanimous conclusion with respect to the applicability of Section 879(a) to the present cases is further buttressed by the canon that the more recent statute dominates the less recent[6] for, as Judge Wilkey notes,[7]

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[3] Section 33-414(a) provides:

> A search warrant may be issued by any judge of the Superior Court of the District of Columbia or by a United States commissioner for the District of Columbia when any narcotic drugs are manufactured, possessed, controlled, sold, prescribed, administered, dispensed, or compounded *in violation of the provisions of this chapter*, and any such narcotic drugs and any other property designed for use in connection with such unlawful manufacturing, possession, controlling, selling, prescribing, administering, dispensing, or compounding, may be seized thereunder, and shall be subject to such disposition as the court may make thereof and such narcotic drugs may be taken on the warrant from any house or other place in which they are concealed.

(emphasis supplied).

[4] *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932); *Kepner* v. *United States*, 195 U.S. 100, 125 (1904). Compare *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957).

[5] Fed.R.Crim.P. 41(c). At the time the warrants in controversy were issued and executed, Rule 41(c) authorized a direction for nighttime service only where the affidavit supporting the warrant was positive that the property to be seized was on the person or in the place to be searched. The positivity requirement has since been deleted, and Rule 41(c) now permits such a direction for reasonable cause shown. See note 16, *infra*.

[6] *Schick* v. *United States*, 195 U.S. 65, 68-69 (1904); *United States* v. *Hosmer*, 76 U.S. (9 Wall.) 432, 435 (1869).

[7] *Ante* p. 6.

Section 879(a) was considered and passed after enactment of Section 23-521 and its companion provisions. Additional support for our construction is derived from the requirement of the Controlled Substances Act that where one of its specifications so conflicts with a state law that the two cannot be read consistently, the federal regulation controls the field.[8] I believe that such a conflict exists between Section 879(a) and the District provisions,[9] and hence that effect must be given to the former as Congress has mandated.

II

In agreement with my colleagues up to this point, I now arrive at the place where our paths diverge. They hold that Section 879(a) works no change in its predecessor statute, 21 U.S.C. § 1405(1), which permitted search warrants in federal narcotic investigations to be served at any time of the day or night so long as the authorizing magistrate or judge was satisfied as to the existence of probable cause for the search. On the basis of the language of Section 879(a), which I consider to be very plain, I am unable to accept that interpretation.

I perceive no ambiguity in the wording of Section 879(a) which would require a probe into its legislative history. As a comparison of that section with former Sec-

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[8] Section 903 of the Act provides:

> No provision of this subchapter shall be construed as indicating any intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903 (1970). The District of Columbia falls within the Act's definition of "State". 21 U.S.C. § 802(24) (1970).

[9] As I later point out, text *infra* at notes 14-15, the local provisions for nighttime execution of search warrants are considerably more stringent than that of § 879(a), and thereby conflict with the disposition of Congress to make federal narcotics searches at night less rather than more difficult than other types of searches.

tion 1405(1) readily reveals, the two provisions are not nearly identical.[10] Congress did not reenact the earlier in the later without significant alteration; it changed the language of Section 1405(1) importantly by addition of the final clause—"and for its service at such time." Reading that clause with the preceding part of the section and applying normal rules of English grammar, I can construe the whole to mean but one thing: for service of a search warrant at night, probable cause must be shown for the search itself *and* probable cause must be shown for service of the warrant "at such time." Indeed, as Judge Kelly stated in dissent in *United States* v. *Thomas*,[11] to hold otherwise would be to render the added words meaningless.

In the face of an unambiguous statute, resort to legislative history serves no useful purpose.[12] Here, although both of my colleagues resort to legislative comment on Section 879(a) to support their interpretation of that section, it seems to me that the comment introduces uncertainty not present in the section when examined alone. The House Report states that Section 879(a) "incorporates" former Section 1405 and authorizes anytime-service on "probable cause." [13] But the report intimates noth-

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[10] Section 879(a) reads:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

[11] 294 A.2d 164 (D.C.App.), *cert. denied*, 409 U.S. 992 (1972). In *Thomas*, a majority of the court construed § 879(a) as my colleagues do here. *Id.* at 166.

[12] *United States* v. *Public Util. Comm'n of California*, 345 U.S. 295, 315 (1953); *Ex parte Collett*, 337 U.S. 55, 61 (1949); See also *United States* v. *Rice*, 327 U.S. 742, 752-53 (1946).

[13] "Subsection (a) of this section incorporates 18 U.S.C. 1405 and authorizes service of a search warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U.S. magistrate issuing the warrant." H.R.Rep. No. 91-1444 (pt. I), 91st Cong., 2d Sess. 54 (1970). Identical language is used in the Senate Report, S. Rep. No. 91-613, 91st Cong., 1st Sess. 30-31 (1969).

ing as to whether the probable cause which it says must be established to the satisfaction of the magistrate or judge for service at "any time" is simply probable cause to search or, rather, probable cause to search at a particular time. This amphibology in the legislative history offers no clarification of what is already obvious to me from Section 879(a) itself.

I am convinced that Section 879(a) exacts more for a nighttime search than merely probable cause for a search. I cannot, however, accept appellees' argument that Section 879(a) embraces the criteria for nighttime searches which are contained in the general search warrant provisions of D.C. Code §§ 23-521 to 23-523.[14] To require compliance with those standards in order to activate Section 879(a) would be to strain its wording beyond any perceptible intent of Congress in enacting special measures to control the drug traffic. Whatever may have been its purpose in selecting the language of Section 879(a), it could hardly have sought to limit nighttime searches for controlled drugs as strictly as nighttime searches in non-drug cases.[15]

Nor am I persuaded to my colleagues' view that Section 879(a) countenances a direction for a nighttime search just on probable cause to believe that the sought-after drugs are then present on the person or the property to be subjected to the search. Unless there is a showing of probable cause to believe that the matter to be seized will be found by search of a designated person

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[14] D.C. Code § 23-522(c)(1) (Supp. V 1972) permits search warrants to be executed at any time of the day or night only upon probable cause to believe that

> (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances. . . .

[15] As the House Report states, the purpose of Congress in enacting the Controlled Substances Act was to deal with narcotic usage by more effective methods of law enforcement. See H.R. Rep. No. 91-1444 (pt. I), 91st Cong., 2d Sess. 1 (1970).

or place, a search warrant cannot issue at all.[16] Consequently, my colleagues' construction of Section 879(a) would demand no more for a nighttime search than one in the daytime; in other words, no more than is prerequisite for any search. If, as I think, the last clause of Section 879(a) establishes a probable cause requirement for nighttime execution additional to probable cause to search,[17] their construction reads that clause completely out of the section, and would leave the door wide open to nighttime execution of any warrant licensing a search for controlled substances.

In my view, the probable cause which Section 879(a) exacts for searches at night can be supplied only by circumstances demonstrating reasonable cause for a search at that particular time.[18] Section 879(a) calls for something above and beyond the showing that would support a daytime search, and that would require a degree of justification outweighing the potentially more serious intrusion on privacy inherent in any nighttime search. Not all searches for controlled substances possess the same degree of urgency, nor do all applications for nighttime search warrants induce the same conviction of need. Some probable cause is more probable than some other, and some ultimately turns out to be a false alarm. A standard of reasonable cause which enables a realistic evalua-

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[16] *Sgro* v. *United States*, 287 U.S. 206, 210-11 (1932); *Schoeneman* v. *United States*, 115 U.S.App.D.C. 110, 113, 317 F.2d 173, 176 (1963); *Rosencranz* v. *United States*, 356 F.2d 310, 315-18 (1st Cir. 1966); *Durham* v. *United States*, 403 F.2d 190, 193-94 (9th Cir. 1968). See also *Jones* v. *United States*, 362 U.S. 257, 270-71 (1960); *United States* v. *Ramirez*, 279 F.2d 712, 715 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960).

[17] See text *supra* at notes 10-11.

[18] The standard of "reasonable cause shown" has replaced the "positivity" requirement for nighttime searches under former Fed.R.Crim.P. 41(c). The Rule as amended reads in pertinent part:

> The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

tion of the competing public and private interests accommodates the myriad situations confronting magistrates and judges far better than any inexorable rule possibly could. And such a standard serves well the legislative objectives underlying Section 879(a) while maintaining an appropriate sensitivity to the concern for privacy shared by the citizenry at large.

The test of reasonable cause for nighttime execution does not demand a demonstration that drugs are positively on the premises at night, or that they could be found on the premises only at night, or that for some reason a search would be impossible in the daytime. It does summon some factual basis for a prudent conclusion that the greater intrusiveness of nighttime execution of the warrant is justified by the exigencies of the situation. The remaining question, then, is whether there was justification of that caliber in these cases.

III

Consideration of this question marks the point at which I am able to rejoin my colleagues—in the disposition of these appeals. For while I do not subscribe to the probable cause standard they espouse for nighttime searches under Section 879(a), I am satisfied that the warrants and supporting affidavits in these cases afforded ample foundation for allowance of such searches under the test I have endeavored to articulate.

The affidavits in the two cases are quite similar, and they portray very similar situations. The affiant, a police officer, was told by an informant of proven reliability that a named individual—in each case, the appellant—was selling narcotic drugs on specified premises. The informant advised of a recent purchase which he had made, and stated that he could transact another for the edification of the officer. The information supplied by the informant was then verified by a transaction, at the place and with the person previously specified, under controlled conditions leaving no doubt as to a sale of narcotics.

In the recitals bearing vitally on the question at hand, the search warrants in both cases were identical. Each

stated that the magistrate was "satisfied that there is probable cause to believe that" narcotics and narcotic paraphernalia "is being concealed on the" described premises. Each warrant proceeded to direct that it be served and that the search be made "at anytime in the day or night." The service and search occurred in the nighttime within one day in one instance, and within three days in the other instance, after the verified on-premises drug purchase was made.

Beyond cavil, the affidavit disclosed and the magistrate found reasonable cause for a nighttime search in each of these cases. The showing went beyond grounds for believing that narcotics were kept on the premises searched; it extended to ground for believing that a drug-peddling operation persisted there. Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated. For this reason, I concur in the conclusion that there was an ample legal and factual basis for the searches, and in reversal of the orders suppressing their fruits.

[Reported at 477 F.2d 428]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 71-1669
Criminal 667-71

[Filed May 11, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

UNITED STATES OF AMERICA, APPELLANT

v.

LONNIE GOODING

Before: Fahy, Senior Circuit Judge; Robinson and Wilkey, Circuit Judges

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

SUPREME COURT OF THE UNITED STATES

No. 72-6902

LONNIE GOODING, PETITIONER

v.

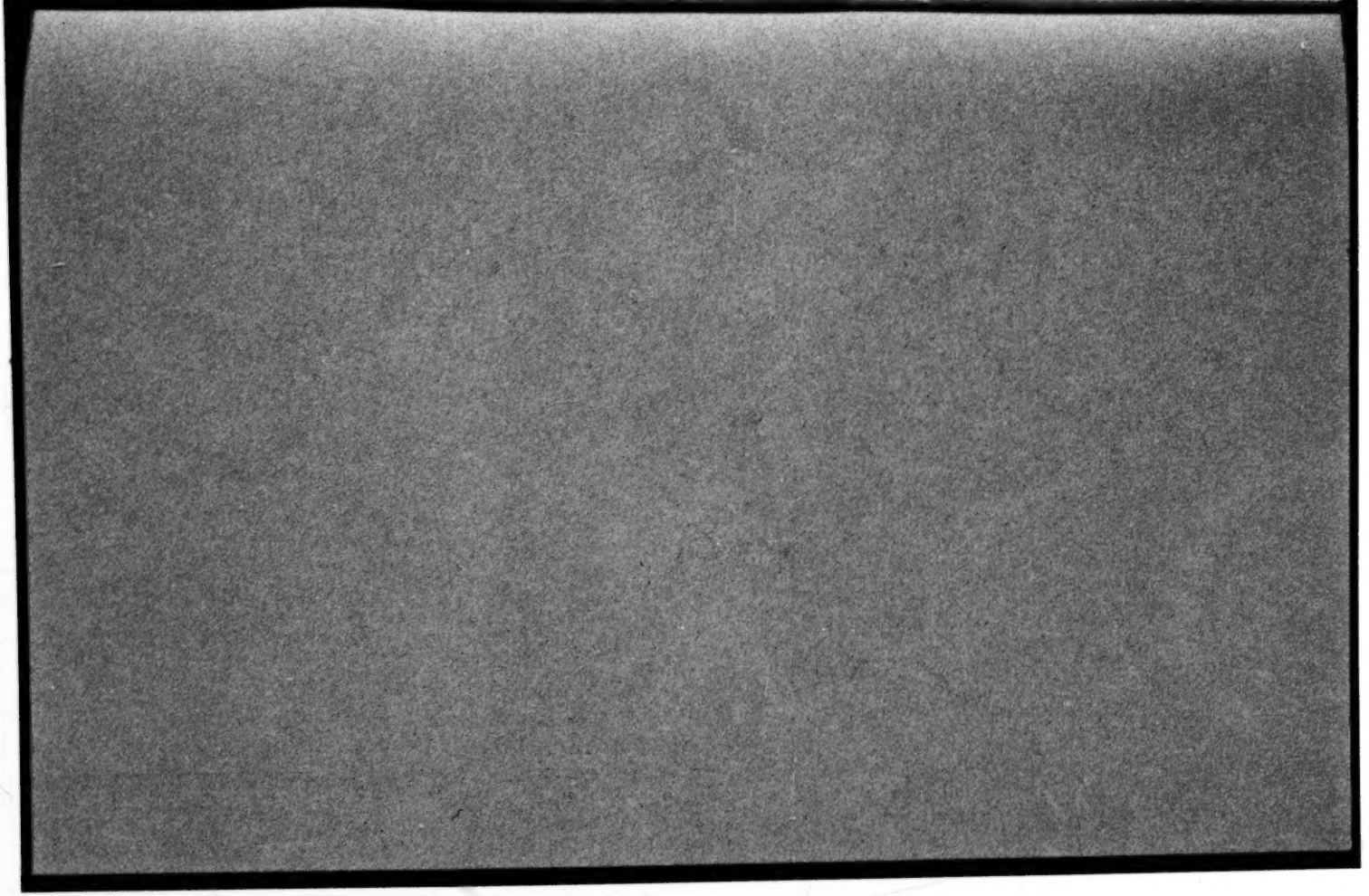
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 15, 1973

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Supreme Court, U. S.
FILED
FEB 12 1974
MICHAEL RODAK, JR., CLERK

No. 72-6902

In the Supreme Court of the United States

OCTOBER TERM, 1973

LONNIE GOODING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6902

LONNIE GOODING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 24) is reported at 477 F. 2d 428. The opinion of the district court (A. 17) is reported at 328 F. Supp. 1005.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1973. A petition for rehearing with suggestion for rehearing *en banc* was denied on May 11, 1973 (A. 53). The petition for a writ of certiorari was filed on June 7, 1973, and was granted on October 15, 1973 (A. 54). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether a search occurring at 9:30 p.m. is a nighttime search.

2. Whether under applicable provisions of the District of Columbia Code a special showing of necessity is required to obtain authorization for nighttime execution of a warrant to search for narcotics.

3. Whether under 21 U.S.C. 879(a) a special showing of necessity is required to obtain authorization for nighttime execution of a warrant to search for narcotics.

4. Whether, assuming no special showing of necessity is required for nighttime execution of a warrant under Section 879(a), an otherwise valid nighttime search warrant is invalidated because it was obtained by members of the Metropolitan Police of the District of Columbia.

5. Whether the federal courts should invoke their supervisory powers to suppress evidence obtained pursuant to a warrant issued by a United States magistrate, where the alleged defect in the warrant did not result in a violation of the Fourth Amendment and was at most the product of a good-faith error of judgment on the part of the magistrate.

STATUTES AND RULES INVOLVED

21 U.S.C. 879(a) provides:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe

that grounds exist for the warrant and for its service at such time.

18 U.S.C. (1964 ed.) 1405 provided:

> In any case involving a violation of any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code, a violation of subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or a violation of the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a)—
>
> (1) a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist, and
>
> (2) a search warrant may be directed to any officer of the Metropolitan Police of the District of Columbia authorized to enforce or assist in enforcing a violation of any of such provisions.

Former Rule 41 of the Federal Rules of Criminal Procedure (18 U.S.C. App., 1970 ed.) provided in pertinent part:

> (c) * * * The [search] warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. * * *
>
> * * * * *
>
> (g) This rule does not modify any act, inconsistent with it, regulating search, seizure

and the issuance and execution of search warrants in circumstances for which special provision is made. * * *

Rule 41 of the Federal Rules of Criminal Procedure, effective October 1, 1972, provides in pertinent part:

(c) *Issuance and Contents.* A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execu-

tion at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

* * * * *

(h) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

4 D.C. Code 138 provides:

> Any warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force, without any backing or indorsement of the warrant, and according to the terms thereof; and all provisions of law in relation to bail in the District shall apply to this chapter.

Pertinent parts of Title 23 of the District of Columbia Code provide:

> Section 521(a)—Under circumstances described in this subchapter, a judicial officer may issue a search warrant upon application of a law

enforcement officer or prosecutor. A warrant may authorize a search to be conducted anywhere in the District of Columbia and may be executed pursuant to its terms.

Section 521(f)(5)—[A search warrant shall contain] a direction that the warrant be executed during the hours of daylight or, where the judicial officer has found cause therefor, including one of the grounds set forth in section 23–522 (c)(1), an authorization for execution at any time of day or night;

Section 522(c)(1)—The application may also contain—a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances; * * *

Section 523(b)—A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant pursuant to section 23–521(f)(5), shall be executed only during the hours of daylight.

33 D.C. Code 414 provides in pertinent part:

(a) A search warrant may be issued by any judge of the Superior Court of the District of Columbia or by a United States commissioner for the District of Columbia when any narcotic drugs are manufactured, possessed, controlled, sold, prescribed, administered, dispensed, or compounded, in violation of the provisions of this chapter, and any such narcotic drugs and any other property designed for use in connec-

tion with such unlawful manufacturing, possession, controlling, selling, prescribing, administering, dispensing, or compounding, may be seized thereunder, and shall be subject to such disposition as the court may make thereof and such narcotic drugs may be taken on the warrant from any house or other place in which they are concealed.

* * * * *

(c) The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

* * * * *

(h) The judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night.

33 D.C. Code 709 provides:

(a) A search warrant may be issued upon probable cause, supported by affidavit particularly describing the property to be seized and place to be searched, by any judge of the Superior Court of the District of Columbia or by the United States Commissioner for the District of Columbia, to any officer of the Metropolitan Police Department when any dangerous drugs are manufactured, possessed, prescribed, and delivered in violation of the provisions of this chapter, and any such dangerous drugs and any other property designed for use in connection with such unlawful manufacturing, possession, prescribing, or delivery, may be seized thereunder and shall be subject to such disposition as

the court may make thereof, and such dangerous drugs may be taken on the warrant from any house or other place in which they are concealed.

(b) Any search warrant issued in accordance with the provisions of subsection (a) of this section may be served at any time in the day or night and must be executed and returned to the issuing authority within ten days after its date.

STATEMENT

1. On February 11, 1971, Officer Marion L. Green of the Metropolitan Police of the District of Columbia appeared before a United States Commissioner sitting in the United States District Court for the District of Columbia and applied for a warrant to search petitioner's residence for narcotics and related drug paraphernalia, which he had probable cause to believe petitioner was possessing in violation of Section 4704 (a) of Title 26 of the United States Code (1964 ed.). In the supporting affidavit, the sufficiency of which to establish probable cause for the issuance of a search warrant was not disputed (Tr. 20, 51), Officer Green affirmed that on February 9, 1971, an informer of proven reliability told him that petitioner was engaged in selling heroin at his apartment. Pursuing this tip, Green and another officer, after searching the informant, accompanied him to petitioner's apartment building during the evening hours (Tr. 23). There, the informant, observed by Green, entered petitioner's apartment; he left a few minutes later carrying heroin (A. 8).

Based on the foregoing facts, the United States Commissioner issued a warrant to search petitioner's apartment and directed that the warrant might be served "at any time in the day or night" (A. 10). At 9:30 p.m. the following day (February 12, 1971), Green and other local law enforcement officers proceeded to petitioner's apartment with the search warrant. After the officers knocked at the door, they responded to an inquiry from a man inside that they were police officers with a search warrant (Tr. 10, 38). Fifteen to thirty seconds then elapsed, during which the sound of running footsteps was heard, leading the officers to conclude that petitioner was attempting to dispose of the narcotics (Tr. 10, 32–33). The officers then broke open the door and observed petitioner hastening to a back room (Tr. 10–12, 41).[1] After apprehending him, they discovered in his pockets seven tin-foil packets containing heroin (Tr. 15). On a chair next to the bed they found more narcotics and various types of narcotics paraphernalia (Tr. 12–13, 36–37). The total amount of heroin seized was 5,240 milligrams, which was sufficient to make one hundred heroin capsules (Tr. 17–19).

2. On April 6, 1971, a grand jury empanelled in the United States District Court for the District of Columbia returned a two count indictment charging peti-

[1] Petitioner alleged in his motion to suppress, and two witnesses for petitioner testified at the suppression hearing, that the officers did not knock before forcing entry into petitioner's apartment. This alleged entry without knocking was not ruled upon by the district court or the court of appeals and is not in issue before this Court (Pet. Br. 3, n. 3).

tioner with violations of 26 U.S.C. (1964 ed.) 4704(a) (possession of narcotic drugs not in the original stamped package) and 21 U.S.C. (1964 ed.) 174 (concealment of narcotic drugs, knowing them to have been illegally imported).[2] Petitioner moved to suppress the evidence seized in the search. He alleged that the nighttime execution of the warrant had failed to comply with the provisions of 23 D.C. Code 521–523 (set forth at pp. 5–6, *supra*)[3] and that the United States Code provision for nighttime execution of a drug related search warrant, 21 U.S.C. 879(a) (set forth at pp. 2–3, *supra*)[4] does not apply to the warrants executed by the Metropolitan Police of the District of Columbia. The standards for nighttime searches under Title 23 are stricter than those of 21 U.S.C. 879, and there was no dispute that the application for the warrant in this case did not meet the Title 23 requirements (A. 26).

On June 14, 1971, the district court granted petitioner's motion to suppress (A. 17–21). It held that search warrants issued by United States District Court judges and magistrates (as opposed to officials of the local District of Columbia courts) and relating specifically to violations of federal laws come within the ambit

[2] These provisions were repealed, effective May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub. L. 91–513, 84 Stat. 1236, 1291–1292).

[3] These provisions, part of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91–358, 84 Stat. 473, 614–615), became effective on February 1, 1971.

[4] This statute was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1236, 1274. Section 879(a) became effective on October 27, 1970.

of local law, *i.e.*, Title of the District of Columbia Code, rather than 21 UC. 879(a). The district court further held that 23 D.Code 521–523, is a special statute supereceding a prioneral statute (21 U.S.C. 879 (a)) and that Section21–523 make no distinction between warrants invding local offenses and warrants involving offenseander the United States Code (A. 19–20).

3. The United Stateppealed to the court of appeals pursuant to 18 .S.C. 3731 (A. 22–23). On March 26, 1973, that ct entered a judgment reversing the order of the driet court. Each of the three judges of the court of peals wrote an opinion; each agreed that the distri court's motion to suppress should be reversed on e ground that the nighttime search of petitioner's sidence was governed by 21 U.S.C. 879(a), not by D.C. Code 521–523. Writing the opinion for the co:, Judge Wilkey pointed out that 21 U.S.C. 879(a) is more specific as to subject matter ("search in natics cases") and more recent than Title 23 (becauseconsidered and passed" after Title 23); hence, its tes should prevail (A. 28). As to the precise requirents of Section 879(a), Judge Wilkey held that, likes immediate predecessor (18 U.S.C. (1964 ed.) 140: Section 879(a) required for nighttime execution of drug-related search warrant only a normal showing probable cause to believe that the contraband sought ll be found on the premises at any time. It "requirenly *grounds* for service at night in the sense thate narcotics sought will probably be present on thamed property at night" (A. 30, 36).

In his concurring opinion, Judge Fahy was of the view that as between the nighttime search warrant provisions of Title 23 and those of 33 D.C. Code 414, the latter, dealing specifically with drug violations, should prevail. However, as between 33 D.C. Code 414 and 21 U.S.C. 879(a), he was of the view that Section 879(a) governs, because he viewed Section 414 as applying only to violations of local District of Columbia provisions. He, too, considered Section 879(a) as requiring only a showing of probable cause that grounds for the application exist (A. 36–42).

Finally, Judge Robinson also concluded that 21 U.S.C. 879(a) controlled over local District of Columbia statutes. He did not, however, agree that Section 879(a) required only a showing of probable cause for a nighttime search; rather, he concluded that Congress in passing Section 879(a) had intended to require a demonstration of "something above and beyond" the showing of probable cause that would normally support the issuance of a search warrant (A. 50). Judge Robinson, however, viewed the instant affidavit as meeting this test, since it provided grounds for belief not only that drugs were kept in petitioner's apartment but also that a drug peddling operation persisted therein. Judge Robinson concluded: "Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated" (A. 52).

SUMMARY OF ARGUMENT

Petitioner challenges the validity of a warrant pursuant to which a search of his premises was made at approximately 9:30 p.m. on February 12, 1971. Although there was concededly probable cause to believe that narcotics and narcotic paraphernalia would be found in his apartment, and although the warrant complied in all respects with the Warrant Clause of the Fourth Amendment and expressly authorized execution at night, petitioner argues that the application for the warrant failed to make the requisite showing of necessity which he claims is mandated by 23 D.C. Code 521–523 and 21 U.S.C. 879(a) before the magistrate may authorize a nighttime search. This claim, which has been rejected by both the Court of Appeals for the District of Columbia Circuit and the District of Columbia Court of Appeals, is based upon an erroneous interpretation of the various provisions governing nighttime searches in narcotics cases, and in this particular case ignores the fact that the search at issue here was not a nighttime search. Moreover, petitioner erroneously assumes that, if his interpretation of the various statutes is correct, any evidence obtained must be suppressed.

I

A. The two statutes which petitioner claims were not complied with here, 23 D.C. Code 521–523 and 21 U.S.C. 879(a), do not purport to specify when a search is a nighttime search for the purpose of the

special showing petitioner alleges is mandated. Rule 41(h) of the Federal Rules of Criminal Procedure, however, defines such a search as one taking place between the hours of 10 p.m. and 6 a.m. This search took place at 9:30 p.m. Since the same basic policy considerations—that searches conducted in the middle of the night, during the hours when persons are likely to be asleep, involve a greater intrusion than ordinary searches and therefore require a greater justification—apply to searches regardless of the statutory provision under which they are conducted, there is no sound basis for applying a different definition of a nighttime search under 21 U.S.C. 879(a) and 23 D.C. Code 521–523 than is applicable to nighttime searches generally under Fed.R.Crim.P. 41(c).

B. There are three separate provisions in the District of Columbia Code dealing with nighttime searches. Title 23 of the D.C. Code (Sections 521–523), upon which petitioner relies, is the equivalent of Fed.R. Crim.P., Rule 41, and generally prescribes the conditions for the issuance of search warrants. Enacted in 1970, it imposes a requirement of a specific showing, the nature of which is clearly described, in order for authorization of nighttime execution to be obtained.

Although the standards set out in Title 23 were not complied with here, there are two special statutes in the D.C. Code which permit search warrants to be issued for execution at any time of the day or night, without any special showing, where the search is made for narcotics (33 D.C. Code 414(h)) or for certain dangerous drugs other than narcotics (33 D.C. Code 709(b)). Section 414(h) of Title 33, rather than the

more restrictive provisions of Title 23, is controlling here, since it deals specifically with narcotics cases.

Moreover, the warrant was not invalid under Section 414 because it did not state in so many words that the narcotics sought to be seized were being possessed in violation of Chapter 33 or because the commissioner allegedly failed to "examine" the law enforcement officer under oath. The application for the warrant clearly set forth facts establishing a violation of 33 D.C. Code 402(a), and there is no constitutional, statutory or other authority requiring that the statutes alleged to be violated must be specified on the face of a search warrant. Similarly, it is apparent from the face of the record that both the "examine on oath" and the affidavit requirements of Section 414(c) were complied with when the magistrate asked Officer Green if the statements in the affidavit were true, and he so swore.

C. If the Court nevertheless concludes that the procedural requirements of 33 D.C. Code 414 were not complied with, the lawfulness of the search may still be sustained because it was authorized in conformity to the requirements of 21 U.S.C. 879(a), which was intended to carry forward a scheme for the issuance of drug-related search warrants similar to the procedure in the District of Columbia.

The dissatisfaction with the "positivity" requirement of former Rule 41(c) for nighttime searches which led to the adoption of the special nighttime search statutes in 1956 in the District of Columbia also prompted the adoption of former Section 1405 of Title 18 (the predecessor to 21 U.S.C. 879(a)).

Section 1405 authorized a nighttime search upon a simple showing of probable cause with respect to the offense and the presence of the items sought at the place to be searched. It rejected the requirement of former Rule 41(c) that the applicant for the warrant be "positive" that the property sought is in the place to be searched.

When Congress revised Section 1405 in 1970, it did so in order to expand the liberal nighttime search provisions to cases involving stimulant and depressant drugs as well as narcotic drugs. Although the language of the new provision, considered in a vacuum, tends to support the claim that some special showing is required to obtain authorization for nighttime execution of a warrant under Section 879(a), the legislative history plainly sustains the conclusion of every appellate court which has considered the issue that no change was intended in the application or meaning of the nighttime search provisions of former Section 1405.

Moreover, assuming that some kind of showing other than probable cause for issuance of the warrant itself is required for authorization of nighttime execution, we agree with Judge Robinson's conclusion that the requirement is significantly less stringent than under 23 D.C. Code 521–523 and was satisfied in this case. As he stated in his concurring opinion: "Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated" (A. 52).

D. Although petitioner attempts to show that the warrant did not comply with Section 879(a), his principal claim is that Section 879(a) is not applicable here at all (Br. 13), and that even if Section 879(a) permits a nighttime search without a showing of necessity in cases of suspected violations of the United States Code, that statute is only applicable where the search is conducted by "members of the Bureau of Narcotics and Dangerous Drugs" (Br. 34–35). But this claim ignores the fact that Congress did not repeal the special provisions in Title 33 of the D.C. Code, which permit nighttime searches to be made in narcotics cases without any special showing. It is anomalous to argue that Metropolitan Police may obtain a nighttime warrant without any special showing in cases involving a suspected violation of the local narcotics laws, but that when they obtain such a warrant in cases involving a suspected violation of the United States Code (as they are clearly authorized to do by 4 D.C. Code 138), such a special showing is required by 23 D.C. Code 521–523, even though not required under 21 U.S.C. 879(a).

This consideration aside, there is nothing in the legislative history of the Title 23 provisions to support any such intent on the part of Congress. That title, including the search warrant procedures contained therein, was intended to apply to a new local court system and to prosecutions brought within it, rather than to regulate the district police when engaged in federal investigations. To the extent that the legislative history of Sections 521–523 sheds light on the issue here, it shows these provisions were adopted

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for two reasons: (1) because the District of Columbia Code at the time had no general provision relating to the time of executing search warrants; and (2) because of the intention to replace, by means of such a general provision, the "positivity" test of the Federal Rules with what was considered a superior "need" test. Petitioner does not claim that the new test in Sections 521–523 repealed the special provisions of Section 879(a) of the United States Code applicable to narcotic searches or that it repealed the statute authorizing the Metropolitan Police to execute federal search warrants (4 D.C. Code 138). His claims that the validity of a nighttime search in the District of Columbia in cases involving suspected violations of the United States Code should depend on the uniform worn by the law enforcement officer executing it is thus without support in the legislative history of Sections 521–523.

II

Even if it is ultimately determined that the magistrate erred in authorizing nighttime execution of this warrant, we submit that the evidence seized pursuant thereto should not be suppressed. The warrant and the underlying affidavit here at issue complied in all respects with the Warrant Clause of the Fourth Amendment. The only authority for application of an exclusionary rule here would derive from exercise of the Court's supervisory powers. The exercise of these powers is guided principally "by considerations of justice," *McNabb* v. *United States,* 318 U.S. 332, 341, and the process necessarily affords substantial room for the exercise of discretion to determine

whether an evidentiary rule of exclusion in a given case is essential to effectuate the policy which Congress has formulated.

Although recent studies have cast doubt upon the success of the exclusionary rule as a device for deterring illegal searches and seizures by the police, we do not here challenge the assumption that an exclusionary rule does in fact tend to encourage obedience by law enforcement officers to constitutional and statutory commands. Nevertheless, it is our submission that where, as here, authorization for the search has been obtained in good faith from a neutral and detached magistrate, and the defect in procedure results from an error of judgment on the part of the magistrate, the application of the exclusionary rule serves no deterrent function with respect to the conduct of law enforcement officers and does not provide a suitable occasion for exercise of the Court's supervisory powers.

ARGUMENT

I. THE EXECUTION OF THE WARRANT COMPLIED WITH THE UNITED STATES AND DISTRICT OF COLUMBIA CODES

A. THE SEARCH WAS NOT A NIGHTTIME SEARCH

Petitioner's claim that the warrant could not validly have authorized a search at any hour of the day or night because it did not contain the special showing which he claims is required under 21 U.S.C. 879(a) and 23 D.C. Code 522–523, assumes that the search conducted here at 9:30 p.m. was a nighttime search within the meaning of those statutes. This assumption is erroneous.

1. Section 879(a)

Section 879(a) of Title 21, which permits execution of a warrant at "any time of the day or night" if the judge or United States magistrate is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time, does not contain any specific definition of what constitutes a nighttime search. If the search at issue here had been conducted after October 1, 1972, it would clearly not have constituted a nighttime search, since Rule 41(h) of the Federal Rules of Criminal Procedure, which was promulgated by this Court and became effective as of that date, specifically defines "daytime," for the purpose of identifying the period during which a warrant may be served without any special showing, to be the "hours from 6:00 a.m. to 10:00 p.m." While Rule 41 was not intended to modify any act "inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made" (Rule 41(h)), there is clearly no inconsistency between Rule 41 and Section 879(a) (or 23 D.C. Code 522–523).

Although Rule 41(h) was not in effect at the time of the issuance of this warrant, there is no sound reason to apply a different definition to searches which took place prior to October 1, 1972.[5] The case law defining nighttime searches prior to the adoption of Rule 41(h)

[5] "The general rule * * * is that an appellate court must apply the law in effect at the time * * * [of] its decision." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281–282; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 110.

consisted of confusing and conflicting decisions which ignored the underlying reasons for the disfavor with which nighttime searches are viewed, *i.e.*, that citizens should not be disturbed during hours when they are likely to be asleep by "the extremely serious intrusion of a midnight entry"[6] by police officers into their homes.

Looking largely to technical definitions of the words "daytime" and "nighttime," rather than the critical considerations of policy, it has been held that daytime "continued as long as there was sufficient light or reflection from the sun to enable one readily to recognize a man's features at a reasonable distance" (*Moore* v. *United States*, 57 F.2d 840, 843 (C.A. 5)); that it is still daytime if there is sufficient daylight to read the warrant (*United States* v. *Woodson*, 303 F.2d 49 (C.A. 6)); or that "it is daytime for at least thirty minutes after the time when the sun sets, and it is nighttime from then until thirty minutes before the time when the sun rises" (*United States* v. *Liebrich*, 55 F.2d 341, 343 (M.D. Pa.)).

There is no reason why this Court should apply any of these technical definitions here, when it has already promulgated, and Congress has already accepted, a definition that is faithful to the policies underlying restrictions on nighttime searches.

2. 23 D.C. Code 522–523.

The foregoing discussion applies with equal force to Sections 522–523 of Title 23 of the D.C. Code. While that statute uses the phrase "the hours of daylight"

[6] *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477.

in requiring a special showing for searches not made during that period, rather than the term "daytime" employed in Rule 41 of the Federal Rules, no definition of that term is contained in Title 23 of the D.C. Code. And, given the identity of purpose reflected by the restrictions in Rule 41(c) and those of Sections 522–523, there is no reason to regard the definition of "daytime" in Rule 41(c) as "inconsistent" with the synonymous term employed in the D.C. Code.[7] To the contrary, to the extent that the legislative history of Sections 522–523 provides a guide, there is some indication that Congress did not intend a technical and purposeless definition of the term.

The provisions of Sections 522–523, were "patterned after the nighttime search provisions of the proposed New York Criminal Law Procedure [*sic*], prepared by a distinguished commission created in 1961 and submitted to the New York state legislature in 1968 after six years work, including public hearings and circulation of proposed drafts." Crime in the National Capital, Hearings before the Senate Committee on the District of Columbia on S. 2869, S. 2602, and S. 2980, 91st Cong., 1st Sess., Part 4, p. 1404 (hereafter referred to as "D.C. Crime Hearings").

The New York Criminal Procedure Law, after which Sections 522–523 are "patterned," requires a special showing to be made for searches not conducted "between the hours of 6:00 a.m. and 9:00 p.m."

[7] *Webster's Third International Dictionary* (Unabridged), p. 578, defines the noun "daytime" as "the time during which there is daylight" and the adverb "daytimes" as "during the hours of daylight."

N.Y.C.P.L. 690.30, 690.35.[8] This definition, like the definition promulgated by this Court in Rule 41(h), reflects the basic policy consideration that a "greater potential intrusion upon the privacy of persons [results] from * * * nighttime search[es]." D.C. Crime Hearings, *supra,* at p. 1404. Since Congress did not include a specific definition of a "nighttime search" in Title 23, there is no sound reason for this Court to adopt a definition different from that applicable to other nighttime searches under various Acts of Congress.

B. ASSUMING THE SEARCH WAS A NIGHTTIME SEARCH, THE WARRANT COMPLIED WITH THE DISTRICT OF COLUMBIA CODE.

1. The provisions of Title 33 of the D.C. Code, rather than those of Title 23, govern drug-related search warrants

There are three separate statutes in the District of Columbia Code dealing with nighttime searches. 23 D.C. Code 521–523, upon which petitioner relies, is the equivalent of Rule 41 of the Federal Rules and generally prescribes the conditions for the issuance of search warrants. Enacted in 1970, it provides that an application for a search warrant may contain a request that it be made executable at any hour of the day or night "upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is

[8] These provisions, as enacted into law, followed the recommendations of the Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (1967), pp. 397–398 (Edward Thompson Pub. Co.), and, as the Commission stated, they were a carryover from Section 801 of the old New York Code of Criminal Procedure.

likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances" (23 D.C. Code 522(c)(1)).

Although the standards set out in Title 23 were not met by this application, there are two special statutes in the D.C. Code which permit search warrants to be issued for execution at any time in the day or night, without any special showing, where the search is made for narcotics (33 D.C. Code 414(h)) or for certain dangerous drugs other than narcotics (33 D.C. Code 709(b)).

These two statutes were added to the D.C. Code in 1956, the same year in which the United States Code was amended to permit nighttime searches in narcotic cases without any special showing beyond the probable cause necessary to sustain the warrant (18 U.S.C. (1964 ed.) 1405). The Senate Judiciary Committee, which had conducted extensive hearings on "Illicit Narcotics Problem In The District of Columbia," concluded that former Rule 41(c), Fed. R. Crim. P., which was then in effect and which permitted nighttime searches only where the affidavits are "positive" that the property is on the person or in the place to be searched, was handicapping the enforcement of the narcotics laws in the District of Columbia (S. Rep. No. 2033, 84th Cong., 2d Sess., pp. 9–12):

> The greatest single handicap resulting from Federal jurisdiction may well be the extreme difficulty in obtaining evidence of a narcotics violation under the stringent search and seizure

> laws and, subsequently, in getting such evidence before the court.
>
> Nine out of ten transactions in illicit narcotic drugs occur during the nighttime, yet, Metropolitan Police officers, as well as agents of the Federal Bureau of Narcotics, cannot obtain a warrant for a search after nightfall unless they are able to swear to an affidavit and show "positiveness" of evidence, as required by rule 41(c) of the Federal Rules of Criminal Procedure.
>
> * * * * *
>
> Therefore, it is imperative that Congress recognize that agencies of the District of Columbia, as well as Federal investigative agencies who are trying to deal with narcotic racketeering on a national and interstate basis, are very badly handicapped in their efforts to stamp out the illicit narcotics traffic by lack of realistic and intelligent Federal law on the subject of search and seizure.

Accordingly, the Senate Judiciary Committee recommended a change in the "positivity" standard so that "'probable cause' will be sufficient to obtain a search warrant at any time of the night or day" (S. Rep. No. 2033, *supra*, at p. 68).

This recommendation resulted in the passage of two separate statutes for the District of Columbia. Section 709(b) of Title 33 was included in a newly promulgated chapter dealing with the regulation and control of certain drugs other than narcotics. It provided that any warrant issued to seize dangerous drugs under that chapter "may be served at any time in the day or night." Moreover, no special showing is required

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to obtain such a warrant; it could be issued merely "upon probable cause, supported by affidavit particularly describing the property to be seized and the place to be searched" (Section 709(a)).

Congress also amended Section 414(h) of Title 33, which was contained in a previously enacted chapter involving the regulation of narcotic drugs. The amendment eliminated the "positivity" requirement that had previously been contained in Section 414(h) and instead mandated that the judge or commissioner "shall insert a direction in the warrant that it may be served at any time in the day or night."

These sections of Title 33 were not repealed by Congress in 1970 when it revised, codified and enacted Title 23 of the District of Columbia Code as "[t]he general and permanent laws of the District of Columbia relating to criminal procedure" (Section 210(a) of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 604) and included therein Sections 521–523, dealing with search warrants. Those provisions prescribe only the *general* rules regarding the execution of search warrants in the District of Columbia and do not govern narcotics searches.[9] The legislative history of 23 D.C. Code 521–523 (discussed at pp. 46–51,

[9] Sections 521–523 do not purport to treat the numerous particular cases with which Congress had specifically dealt. In addition to 33 D.C. Code 414(h) and 709(b), the following additional statutes regarding search warrants in particular cases were not mentioned in, and presumably not affected by, the enactment of Title 23: 6 D.C. Code 904, 22 D.C. Code 805, 25 D.C. Code 129, and 48 D.C. Code 205 and 305. Petitioner concedes that the validity of these statutes, including Section 414, "is not being challenged by this proceeding" (Pet. Br. 34, n. 49).

infra) shows that the provisions were adopted for two reasons: (1) because the District of Columbia Code at the time had no general provision relating to the time of executing search warrants; and (2) because of the intention to replace, in such a general provision, the "positivity" test of the Federal Rules with what was considered the superior "need" test.[10]

The enactment of this section, however, did not affect the execution of *narcotics* search warrants, since, as noted above, both the United States Code and the District of Columbia Code already contained specific provisions governing the execution of such warrants (33 D.C. Code 414(h) and 709(b); 18 U.S.C. (1964 ed.) 1405). "[I]t is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758, and cases cited.[11]

2. Nighttime execution of this warrant was valid under 33 D.C. Code 414(h)

Contrary to the suggestion of Judges Wilkey and Fahy in the court of appeals (A. 29–30, n. 14; 41) the

[10] H. Rep. No. 91–907, 91st Cong., 2d Sess., pp. 109–110; S. Rep. No. 91–538, 91st Cong., 1st Sess., pp. 12–13. See also the testimony of Associate Deputy Attorney General Santarelli, quoted in the District Judge's Memorandum (A. 19–20, note), and the prepared statements of Mr. Santarelli and the United States Attorney for the District of Columbia concerning the proposed nighttime search provisions. Anti-Crime Proposals, Hearings Before Subcommittee Nos. 1 and 3 of the House Committee on the District of Columbia, 91st Cong., 1st Sess. 92, 110; D.C. Crime Hearings, pt. 4, *supra*, at pp. 1389, 1404, 1416.

[11] The District of Columbia Court of Appeals has held that the special provisions of Title 33, and not the general provisions of Title 23, apply to nighttime narcotic searches in the

warrant was not invalid under Section 414(h) because it did not state in so many words that the narcotics sought to be seized were being possessed in violation of Title 33 or because the commissioner allegedly failed to interrogate the law enforcement officer under oath.

a. Section 414(a) authorizes the issuance of a search warrant by a "United States commissioner"—among others—"when any narcotic drugs are * * * possessed, controlled, [or] sold * * * in violation * * * of this chapter." [12] Before issuing the warrant authorizing a search of petitioner's apartment, the Commissioner had made a finding of probable cause to believe that "heroin, capsules, envelopes, syringes, tourniquets, cookers, and paraphernalia used in the preparation of heroin for distribution or use" were concealed there (A. 10). It is beyond dispute that precisely the

District of Columbia. *United States* v. *Thomas*, 294 A. 2d 164, certiorari denied, 409 U.S. 992. "The question as to which of the [allegedly] inconsistent provisions shall govern [which] arises in a local statute confined in its [application] to the District of Columbia" is for the local courts of the District, and this Court will ordinarily not review such decisions. Cf. *District of Columbia* v. *Pace*, 320 U.S. 698, 702. Under the D.C. Court Reorganization Act, of course, the District of Columbia Court of Appeals is the equivalent of the "highest court of a state." 28 U.S.C. 1257; *Palmore* v. *United States*, 411 U.S. 389, 395. The same deference accorded by this Court and the courts of appeals to the construction of state law by a state's highest court should be accorded to constructions placed on the D.C. Code by the District of Columbia Court of Appeals.

[12] The reference in 33 D.C. Code 414(a) to "United States Commissioner" is deemed to mean "United States Magistrate" on and after the date the first United States Magistrate for the District of Columbia assumed office. Pub. L. No. 90-578, § 402(b)(2), 82 Stat. 1118.

same showing also established a violation of 33 D.C. Code 402(a).[13]

We are aware, of course, that the search warrant in issue, which was obtained by local law enforcement officers, specifically referred to violations of the federal narcotics statutes and made no reference to Title 33. We submit, however, that this fact is no bar to finding that the search warrant complied with all the search warrant provisions of Title 33 and was therefore valid thereunder, independently of its validity under any other statutes. There is no constitutional, statutory or other authority requiring that the statutes alleged to be violated must be specified on the face of a search warrant. Indeed, Form 15, Fed.R. Crim.P., Appendix, does not contain a place to include reference to any particular provision of law alleged to have been violated. Thus, search warrants have been upheld where no statute at all was cited, *United States* v. *Averell*, 296 F. Supp. 1004, 1014 (E.D.N.Y.),[14] or where a totally inapplicable provision was relied upon, *Ray* v. *United States*, 10 F. 2d 359 (C.A. 6); cf. *Hysler* v. *United States*, 86 F. 2d 918 (C.A. 5).

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[13] 33 D.C. Code 402(a) provides:

"It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter."

[14] The court in *Averell* suggested that the omission from a search warrant of an item not required by the Fourth Amendment (in *Averell* it was the name of the affiant) could be cured by amendment *after the execution of the warrant*, provided that no prejudice would result. 296 F. Supp. at 1014. The constitutional requirements of designating with specificity what

b. There is likewise no merit to the suggestion that the warrant is defective because the magistrate failed to "examine on oath" the law enforcement officer who applied for the warrant.

Section 414(c) provides that:

> The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

It is apparent from the face of this record that the foregoing requirement was complied with, since Officer Green's affidavits were subscribed and sworn to before Commissioner Margolis (A. 7, 9), and it was he who issued the warrant (A. 10–11). Thus, when the Commissioner asked Officer Green if the statements in the affidavit were true, and he so swore, both the "examine on oath" and the affidavit requirements of the statute were satisfied. To demand some further ritual involving an oral repetition of the facts recited in the affidavit, even though the magistrate is satisfied by the contents of the affidavit and the oath taken in his presence, is to impose a nonsensical requirement that could not possibly have been intended by the drafters of this statute. While the "examine" requirement and the affidavit/deposition requirement are conjunctive, this simply means that the

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was to be seized, where, from whom, and on what grounds have all been met in this case. Appellant cannot claim prejudice from an inability to exclude from evidence against him, on the narrowest of technical grounds, that which was constitutionally seized from his apartment.

complainant's oath must be taken before the magistrate personally (satisfying the first prong) and that the facts relied upon in issuing of the warrant must be reduced to writing (satisfying the second prong), both of which occurred in this case.[15]

C. NIGHTTIME EXECUTION OF THIS SEARCH WARRANT WAS ALSO PROPERLY AUTHORIZED UNDER 21 U.S.C. 879(a)

We have shown in the preceding discussion that the magistrate's authorization of nighttime execution of this warrant was valid under the controlling provision

[15] Section 414(c) "is an almost verbatim reproduction of section 6, Title XI, Espionage Act, June 15, 1917, c. 30, 40 Stat. 229." *Ward* v. *United States*, 281 F. 2d 917, 918 (C.A.D.C.). The Espionage Act (18 U.S.C. (1940 ed.) 616) was in turn taken almost verbatim from provisions of the New York Code of Criminal Procedure, which set out a similar requirement for obtaining arrest and search warrants. H. Rep. Nos. 65 and 69, 65th Cong., 1st Sess., p. 20. ("The new title as presented by the conferees was based upon the New York law on this subject, and follows generally the policy of that law.")

The former provisions of the Espionage Act and the old New York Code of Criminal Procedure have been construed as not mandating that the magistrate conduct actual interrogation of the applicant under oath, where the applicant has filed a satisfactory affidavit, which was subscribed to under oath before the magistrate. *Rose* v. *United States*, 45 F. 2d 459 (C. A. 8); *People ex rel. Livingston* v. *Wyatt*, 186 N.Y. 383; *People* v. *Marshall*, 13 N.Y. 2d 28, 35–36; see also, *Laughran* v. *Kelly*, 62 Mass. 199. Moreover, when the provisions of the Espionage Act were replaced by Rule 41 of the Federal Rules of Criminal Procedure, which provides that "[a] warrant shall issue only on affidavit sworn to before the judge or commissioner," the Notes of the Advisory Committee stated the provision "is a restatement of existing law, 18 U.S.C.A. former §§ 613–616, 620; *Dumbra* v. *United States*, 45 S. Ct. 546, 268 U.S. 435, 69 L. Ed. 1032." 18 U.S.C.A. Fed.R.Crim.P., Rules 32 to End, p. 213.

of the D.C. Code, which suffices to sustain the legality of the search and seizure of heroin and narcotics paraphernalia from petitioner. If, however, this Court disagrees that Title 33 sets forth the controlling provision or concludes that its procedural requirements were not here complied with, we submit that the lawfulness of the search may nevertheless be sustained if it was authorized in conformity to the requirements of 21 U.S.C. 879(a). The issue of whether that general federal statute is somehow repealed or its applicability in the District of Columbia is limited by 23 D.C. Code 521–523 is discussed in Part I(D), *infra;* in this section of our brief, we address the question of the correctness of the magistrate's action in authorizing nighttime execution under 21 U.S.C. 879(a) generally.

1. The Background of Section 879(a)

The scheme for the issuance of search warrants set out in the United States Code and the Federal Rules of Criminal Procedure is similar to the provisions in the District of Columbia. We have previously shown that, until 1956, the "positivity" requirement for the issuance of search warrants which was mandated by former Rule 41(c) was applicable to all searches in the District of Columbia and, with certain exceptions not here relevant, to search warrants issued by United States magistrates arising out of violations of the United States Code.

The same considerations which led to the adoption of the special nighttime search statutes in the District of Columbia also prompted the adoption in 1956 of former Section 1405(1) of Title 18, which provided that, in narcotics cases:

> [A] search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist * * *.

Accordingly, under Section 1405, a simple showing of probable cause for the issuance of the warrant itself sufficed to authorize a nighttime search. See *United States* v. *Stallings,* 413 F. 2d 200 (C.A. 7), certiorari denied, 396 U.S. 972; *United States* v. *Castle,* 213 F. Supp. 52 (C.A. D.C.).

Unlike the combined provisions of Title 33 of the D.C. Code, however, the scope of Section 1405 reached only a limited number of offenses, *i.e.,* those involving marijuana and narcotic drugs such as heroin, opium, and cocaine; it did not reach those stimulant or depressant drugs the use and abuse of which did not become a matter of national concern until the late 1960's. See Materials Prepared by the Administration Relating to Proposed Legislation to Regulate Controlled Dangerous Substances and Amend Narcotics and Drug Laws, before the House Committee on Ways and Means, 91st Cong., 2d Sess., p. 246 (hereinafter "Materials"); Comparison of Bills to Regulate Controlled Dangerous Substances and to Amend the Narcotic and Drug Laws, before the House Committee on Ways and Means, August 8, 1970, p. 17 (hereinafter "Comparison of Bills"); 26 U.S.C. (Supp. II, 1952 ed.) 4761, 4731.

Because of the burgeoning problem presented by such dangerous but non-narcotic drugs, the President proposed the Comprehensive Drug Abuse Prevention

and Control Act of 1970, of which Section 879(a) was a part.[16] This comprehensive statutory framework was aimed at reducing the use of both narcotic and stimulant/depressant types of drugs:

> The other side of the drug abuse problem is the illicit traffic in drugs which is both international and interstate in scope. There is an unknown quantity of the nonmedical and nonprescription drugs (heroin, cocaine, marijuana) being continuously smuggled into this country. At the same time, there are substantial amount of prescription drugs, such as the stimulants, depressants and tranquilizers being diverted into illegitimate channels. For example, according to estimates of the National Institute of Mental Health, 50 percent of the over 8 billion annually produced amphetamine pills find their way into nonmedical channels. This diversion is in addition to drugs produced illegally in clandestine laboratories. [S. Rep. No. 91–613, 91st Cong., 1st Sess., pp. 3–4.]

As part of this effort "to strengthen existing law enforcement authority in the field of drug abuse" (preamble to the Drug Abuse Act, 84 Stat. 1236), 21 U.S.C. 879(a) was proposed to replace 18 U.S.C. 1405. Whereas the earlier statute had permitted nighttime

[16] In his message to Congress proposing the Drug Abuse Act, the President stated (Materials, *supra*, at p. 1):

"Within the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans.

"A national awareness of the gravity of the situation is needed; a new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States."

searches upon a simple showing of probable cause only in instances in which the property sought was marijuana or narcotic drugs, Section 879(a) was drafted to provide for such nighttime searches whenever any contraband drug, including the ever more prevalent stimulants, barbiturates, and tranquilizers were suspected to be present.

2. The Enactment of Section 879(a) Was Not Intended To Change the Liberal Nighttime Narcotics Search Provisions of Its Predecessor

Against this background of congressional concern with "a crescendoing nationwide drug abuse problem" (A. 31) and the demonstrable purpose of Congress to expand liberalized nighttime search provisions to cover additional dangerous drugs, Judge Wilkey rightly concluded that it was "inconceivable" that Congress also sought to constrict pre-existing nighttime search authority in narcotics cases.

Section 879(a) permits service of warrants to search for narcotics or other controlled substances "at any time of the day or night" if the issuing magistrate "is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." While the "probable cause" language derives from a constitutional imperative well fleshed out by judicial decisions and therefore requires no special definition or elucidation, the meaning of the rest of the clause is uncertain. Neither the text of the statute nor the legislative history sheds light on how the magistrate must "satisfy" himself, what constitutes "grounds" (a term with no independent history of judicial or legislative definition), or whether

or how such "grounds" must be demonstrated to the magistrate. Judges Wilkey and Fahy found the clause sufficiently ambiguous that they deemed it both necessary and appropriate to resort to the legislative history and to interpret the statute in accord with the congressional intent disclosed thereby. Petitioner and Judge Robinson find it unambiguous, although, ironically, they are unable to agree on its meaning.

We agree that, considered in a vacuum, the language of the clause tends to support the view that some special showing is required to obtain authorization for nighttime execution of a warrant under Section 879(a). However, the legislative history of that provision shows that "no change was intended in application or meaning of section 1405(1) [the predecessor statute] with the enactment of section 879(a)," *United States* v. *Thomas*, C.A. 5, No. 73–1403, decided December 19, 1973, slip op. 24.

Thus, both the House and Senate reports clearly state (H. Rep. No. 91–1444, 91st Cong., 2d Sess., Part I, p. 54; S. Rep. No. 91–613, 91st Cong., 1st Sess., pp. 30–31):

> Subsection (a) of this section [21 U.S.C. 879] incorporates 18 U.S.C. 1405 and authorizes service of a search warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U.S. magistrate issuing the warrant.

Since Section 1405 liberally authorized nighttime execution of narcotics search warrants (see pp. 32–33, *supra*) and required a showing of probable cause only as to the offense and the location of the narcotics at

the place to be searched, the congressional intent to leave unchanged the nighttime search authorization—simply expanding it to other categories of drug offenses—is clearly confirmed.[17]

Moreover, the legislative history is utterly devoid of indications that Congress affirmatively intended to restrict existing nighttime search authority in narcotics cases when it enacted Section 879(a). This is in striking contrast with the action of the same (91st) Congress in adopting general provisions regulating nighttime searches in the District of Columbia in 23 D.C. Code 521–523. The history of those provisions, set out at pp. 35–38 of petitioner's brief, reflects a clear indication of Congress' intent to restrict ordinary nighttime searches to instances in which they are practically "unavoidable." S. Rep. No. 91–538, 91st Cong., 1st Sess., pp. 12–13. In addition, Congress implemented its intention in unmistakable language. Section 522(c) described the showing that must be made if nighttime search authority is requested:

> The application may also contain—
>
> (1) a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed

[17] Apart from the language quoted in the text, which was taken by the reports from explanatory materials submitted by the Department of Justice in connection with the Drug Abuse Prevention and Control Act of 1970, the other Department explanations of the effect of revising Section 1405 shed little light on the problem, since they merely echo the language of the old and new provisions (Materials, *supra*, at p. 246; Comparison of Bills, *supra*, at p. 17).

> during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances.

Petitioner argues, relying on Judge Robinson's concurring opinion below, that "[i]n the face of an unambiguous statute, resort to the legislative history serves no useful purpose" (Pet. Br. 21). The difficulties inhering in this contention are, however, apparent from the fact that Judge Robinson went on to reject petitioner's claim—based on the "unambiguous" language of Section 879(a)—that the statute was intended to require the same showing of "exigent circumstances" for a federal nighttime narcotics search as are required by 23 D.C. Code 521–523 (A. 49):

> I am convinced that Section 879(a) exacts more for a nighttime search than merely probable cause for a search. I cannot, however, accept appellees' argument that Section 879(a) embraces the criteria for nighttime searches which are contained in the general search warrant provisions of D.C. Code §§ 23–521 to 23–523. To require compliance with those standards in order to activate Section 879(a) would be to strain its wording beyond any perceptible intent of Congress in enacting special measures to control the drug traffic. Whatever may have been its purpose in selecting the language of Section 879(a), it could hardly have sought to limit nighttime searches for controlled drugs as strictly as nighttime searches in non-drug cases.

Thus, while Judge Robinson initially found Section 879(a) "unambiguous" and held that there was no necessity to resort to legislative history, he was him-

self forced to resort to the "perceptible intent of Congress in enacting special measures to control the drug traffic" in order to determine its meaning.

In determining the "meaning" of the words of Section 879(a), every court except the district court below has concluded that Congress did not intend to change the effect of former Section 1405(1). *United States* v. *Thomas,* 294 A. 2d 164 (D. C. Ct. App.), certiorari denied, 409 U.S. 992; *United States* v. *Green,* 331 F. Supp. 44 (D.D.C.); *United States* v. *Thomas,* C.A. 5, No. 73-1403, decided December 19, 1973 (*dictum*). These courts have properly looked to the history of the provision to ascertain and effectuate the congressional intent. See *United States* v. *Sisson,* 399 U.S. 267, 292-293, n. 22; *United States* v. *Apex Distributing Co.,* 270 F. 2d 747, 755 (C.A. 9).

3. If Section 879(a) requires some special showing, that requirement was satisfied here

Assuming Judge Robinson is correct that some kind of showing other than probable cause for issuance of the warrant itself is required for authorization of nighttime execution, we agree with his conclusion that the requirement was satisfied in this case (A. 51, 52):

> The test of reasonable cause for nighttime execution does not demand a demonstration that drugs are positively on the premises at night, or that they could be found on the premises only at night, or that for some reason a search would be impossible in the daytime. It does summon some factual basis for a prudent conclusion that the greater intrusiveness of nighttime execution of the warrant is justified by the exigencies of the situation. The remaining

> question, then, is whether there was justification of that caliber in these cases.
>
> * * * * *
>
> Beyond cavil, the affidavit disclosed and the magistrate found reasonable cause for a nighttime search in each of these cases. The showing went beyond grounds for believing that narcotics were kept on the premises searched; it extended to ground for believing that a drug-peddling operation persisted there. Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated. For this reason, I concur in the conclusion that there was an ample legal and factual basis for the searches, and in reversal of the orders suppressing their fruits.

4. District of Columbia police may execute Federal narcotics search warrants

The fact that the warrant was obtained and executed by members of the Metropolitan Police does not affect its validity under Section 879(a), and petitioner's claim that the federal "Controlled Substances Act deals only with the enforcement powers of members of the Bureau of Narcotics and Dangerous Drugs" (Pet. Br. 35) is without substance. Any federal law enforcement agency with general powers may enforce the federal narcotics law. See, *e.g.*, 18 U.S.C. 3052, 3053, and 3056, wherein agents of the Federal Bureau of Investigation, United States Marshals, and Secret Service Agents, respectively, are empowered to make arrests "for *any* felony cognizable under the laws of the United States if they have reasonable

grounds to believe that the person to be arrested has committed or is committing such felony" [19] (emphasis added).

That members of the Metropolitan Police Department are, by statutory mandate, agents of the federal as well as the local government is apparent from an examination of the United States and District of Columbia Codes. Organization Order No. 153 of 1966 (set out as an appendix to Title 1 of the D.C. Code, p. 222 specifically provides:

> The Metropolitan Police Department shall provide maximum protection of life and property

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[19] 21 U.S.C. 878 does, of course, recognize the authority of the Bureau of Narcotics and Dangerous Drugs, providing that

"Any officer or employee of the Bureau of Narcotics and Dangerous Drugs designated by the Attorney General may—

"(1) carry firearms;

"(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

"(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

"(4) make seizures of property pursuant to the provisions of this subchapter; and

"(5) perform such other law enforcement duties as the Attorney General may designate."

This section was included in the Drug Abuse Act not to limit drug arrests solely to BNDD personnel, but to grant such personnel the authority to make arrests for *any* federal offenses, as opposed to the more limited authority previously vested in drug control agents to arrest only for drug-related offenses under 21 U.S.C. (Supp. V, 1964 ed.) 372(e) and 26 U.S.C. (1958 ed.) 7607. See S. Rep. No. 91-613, *supra*, at p. 30; H. Rep. No. 91-1444, *supra*, at pp. 53-54.

in the community through the prevention and detection of crime, through the enforcement of all local and locally applicable statutes, regulations and ordinances, through the latest techniques of criminology, through an active police-community relations program, *and through cooperation with Federal police agencies in the enforcement of Federal laws.* [Emphasis added.] [20]

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[20] Recognition of the responsibility of the District of Columbia police in enforcing federal laws was established much earlier than this 1966 Order. By President Truman's Reorganization Plan No. 5 of 1952 (Title 1, D.C. Code, Appendix, Supp. V, p. 147), all executive authority was transferred to a three-man Board of Commissioners; specifically included within this transfer was authority over the Metropolitan Police Department (Reorganization Plan No. 5 of 1952, Section 1). In carrying out the presidential mandate to implement the basic reorganization of the District government, the Commissioners accordingly promulgated Reorganization Order No. 46 on June 26, 1953 (Title 1, D.C. Code, Appendix (1961 ed.) p. 110). Like Organization Order No. 153, this rule provided:

"The Metropolitan Police Department is established for the purpose of providing maximum protection of life and property in the community through the prevention and detection of crime and the enforcement of all local and locally applicable statutes, regulations, and ordinances. *In the performance of its municipal functions the Department shall cooperate with Federal police agencies in the enforcement of federal laws.*" (Emphasis added.)

Reorganization Order No. 46 was superseded by Organization Order No. 153, *supra*. Then, with President Johnson's Reorganization Plan No. 3 of 1967 (Title 1, D.C. Code, Appendix, p. 150), the three-commissioner form of government for the District of Columbia was abolished in favor of a single commissioner and nine man council; all functions of the former Board of Commissioners, including authority over the Metropolitan Police Department, were transferred to the new Commissioner (Reorganization Plan No. 3 of 1967, Part IV, Section 401). Subsequently, by Commissioner's Order No. 69-614, November

Moreover, 4 D.C. Code 143 imposes criminal penalties on any district policeman who fails to make an arrest "for an offense against the laws of the United States committed in his presence * * *."

Finally, and most significantly, 4 D.C. Code 138 provides:

> Any warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force * * *.

As Mr. Justice Douglas noted in his dissent from the denial of certiorari in *Thomas* v. *United States, supra,* 409 U.S. at 992–993, Section 138 specifically authorizes the District police to execute federal search warrants.[21]

13, 1969, Organization Order No. 153 was ratified with respect to the functions of the Metropolitan Police Department (Title 1, D.C. Code, Appendix, p. 257).

[21] Similarly, Rule 41 as amended, effective October 1, 1972, provides, *inter alia*:

"(a) A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state within the district wherein the property sought is located, upon request of a federal law enforcement officer * * *

* * * * *

"(h) * * * The phrase 'federal law enforcement officer' is used in this rule to mean any government agent * * * who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

Demonstrating the long established view that District police were agents of the federal government, the Attorney General, on March 12, 1973, listed the Metropolitan Police Department among those agencies authorized to request federal search warrants. See A.G. Order 510–73, 38 Fed. Reg. 7244–7245.

While it is true that 18 U.S.C. (1964 ed.) 1405, the predecessor of Section 879(a), contained a specific provision authorizing the District police to execute federal narcotic search warrants, whereas 21 U.S.C. 879 does not, that fact is not controlling. As Mr. Justice Douglas suggested in his dissent in *Thomas* v. *United States, supra,* 409 U.S. at 993, failure to mention the District police by name in Section 879 did not mean that Congress intended to preclude the District police from executing warrants under that section. Rather, it is fair to assume that the explicit provision of former Section 1405 was dropped because unnecessary, since the District police are empowered to enforce federal laws and execute federal search warrants by 4 D.C. Code 138.

D. ASSUMING THE SEARCH WAS A NIGHTTIME SEARCH, 23 D.C. CODE 521–523 IS INAPPLICABLE HERE

Although petitioner attempts to show that the warrant did not comply with Section 879(a), his principal claim is that Section 879(a) is not applicable here at all (Pet. Br. 13), and that "the legislative concern about unnecessary nighttime intrusions and protection of civil liberties in the District of Columbia as expressed in §§ 521–523 [of Title 23] reflects the intent of Congress that all warrants directed to the D.C. police after February 1, 1971, were to adhere to the requirements of Title 23" (Pet. Br. 31).

Petitioner's claim, in effect, is that even if Section 879(a) permits a nighttime search without a showing of necessity in cases of suspected violations of the

United States Code, that statute is only applicable where the search is conducted by "members of the Bureau of Narcotics and Dangerous Drugs" (Pet. Br. 34, 35).

Under this view, the validity of such a search warrant would depend upon the identity of the person who applies for the warrant, and since the warrant here was obtained by members of the Metropolitan Police, it would be invalid to authorize nighttime execution because the showing required by 23 D.C. Code 521–523 was not made. This claim is predicated on a number of erroneous legal assumptions.

1. We do not understand how petitioner can allege that Congress intended that "all warrants," *including those in narcotics cases,* directed to the District of Columbia police after February 1, 1971, must adhere to the requirements of Title 23 (Pet. Br. 31), when, as petitioner concedes (*id.* at 34, n. 49), Congress did not repeal the special provisions in Title 33 of the D.C. Code which permit nighttime searches to be made in narcotics cases without any special showing. It is somewhat anomalous, to say the least, to argue that when the Metropolitan Police obtain a nighttime warrant in cases involving a suspected violation of the local narcotics laws no special showing need be made (indeed, the magistrate is powerless to withhold authority for nighttime execution), but that when they obtain such a warrant—as they are clearly authorized to do (see pp. 41–43, *supra*)—in cases involving a suspected violation of federal narcotics laws, such a

special showing is required by 23 D.C. Code 521–522 (even though not required under 21 U.S.C. 879(a)).[22]

2. This consideration aside, there is nothing in the legislative history of 23 D.C. Code 521–523 that establishes any such intent on the part of Congress.

Prior to the passage of the Court Reform Act (of which 23 D.C. Code 521–523 were a part), the local court system of the District—specifically, the Court of General Sessions—had criminal jurisdiction solely over misdemeanors and petty offenses. See 11 D.C. Code (1967 ed.) 963. Felony prosecutions for violations of either the District of Columbia Code or the United States Code were tried in the United States District Court for the District of Columbia. See 11 D.C. Code (1967 ed.) 521. In order to ease the resultant burden upon the United States District Court, the Court Reform Act provided for a new local court of

[22] Petitioner states: "We are not arguing here—because we do not need to—that D.C. Code §§ 23–215 *et seq.* impliedly repeals D.C. Code §§ 33–414 (Supp. IV, 1971). That conflict is not before this Court because the search warrant here was clearly issued for suspected violations of the federal (U.S. Code) narcotics laws; the D.C. Code's Uniform Narcotic Drug Act (33 D.C. Code §§ 401–425) plays no part here" (Pet. Br. 32, n. 45).

We have shown in Part I(B)(2), *supra*, that the warrant application here established a violation of the D.C. Code's Uniform Narcotic Drug Act and that the warrant was therefore valid under 33 D.C. Code 414(h). But even if the warrant in this case was technically deficient for some reason (such as failure specifically to allege a Title 33 violation), the failure of Congress to repeal Section 414(h) would seem to sap any vitality from petitioner's claim that Title 23 governs "all warrants directed to the D.C. police after February 1, 1971," even when such a warrant is obtained pursuant to Section 879(a).

general jurisdiction, the Superior Court of the District of Columbia (11 D.C. Code 901). The Superior Court was given jurisdiction over any criminal case under any law applicable exclusively to the District of Columbia (11 D.C. Code 923(b)), while the district court's jurisdiction over local criminal offenses was restricted to prosecutions involving violations of the United States Code (11 D.C. Code 501, 502).[23]

It was because of the establishment of this new local court system with a widely expanded criminal jurisdiction that Title 23 was amended as part of the Court Reform Act. When local felonies had been tried in the United States District Court, the applicable rules observed were, of course, those of the Federal Rules of Criminal Procedure. With the creation of the new local court system, however, Congress deemed it advisable to provide at least in part a separate set of criminal procedure rules applicable solely to local District criminal prosecutions: "The Superior Court shall conduct its business according to * * * the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules." 11 D.C. Code 946. Title 23, including the search warrant procedures contained therein, was intended to apply precisely to the new local court system and to prosecutions brought

[23] For a thorough analysis of that Act, see Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L. J. 477 (1971); Kern, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 Am. U. L. Rev. 237 (1970–1971); see also *Palmore* v. *United States*, 411 U.S. 389.

within it and not generally to the District police when engaged in investigations of violations of federal law.[24]

Moreover, to the extent that the legislative history of Sections 521–523 sheds light on the issue here, it shows that Congress intended principally to replace the test of Rule 41(c), Fed. R. Crim. P. (18 U.S.C. App., 1970 ed.), which permitted nighttime searches only when the affidavits were positive that the property sought was on the premises to be searched;[25] this test was the only one applicable in the District of Columbia, except, of course, in the case of drug-related searches as to which 33 D.C. Code 414(h) and 709(b) and 18 U.S.C. (1964 ed.) 1405(1) applied. Fed. R. Crim. P., Rule 41(h) formerly Rule 41(g)).[26]

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[24] As the Deputy Attorney General stated to Congress:

"In matters of criminal law and procedure the transfer of felony jurisdiction to a local court necessitated many changes. The local misdemeanor procedures and the local code were not adequate to handle matters which are [sic] previously in Federal courts drawing on the procedures of the Federal rules and the Federal code." [Crime in the National Capital, Hearings before the Committee on the District of Columbia and Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 1066, S. 1067, S. 1214, S. 1215, S. 1711, and S. 2601, 91st Cong., 1st Sess., Part 3, p. 1153.] See also testimony of Associate Deputy Attorney General Santarelli, D.C. Crime Hearings, *supra*, at p. 13; Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U.L. Rev. 252 (1970–1971).

[25] We note that the instant warrant, in authorizing the search "at any time in the day or night," cited and quoted Rule 41(c) (A. 10–11). Officer Green's affidavit was in fact "positive" that narcotics were in petitioner's apartment (A. 9).

[26] At the time Title 23 was proposed and enacted into law, former 18 U.S.C. 1405 had not yet been modified by and replaced by 21 U.S.C. 879(a). See, *infra*, p. 52, n. 30.

The test for nighttime searches under the proposed Title 23, it was explained, was different from Rule 41 (c), and provided that nighttime searches would be permitted, *inter alia,* when there was probable cause to believe that the property sought would not be found during daylight hours:

> The District of Columbia Code presently contains no provision at all governing the time for execution of a search warrant. Rule 41(c) of the Federal Rules of Criminal Procedure, however, requires that for a nighttime search the affiant be "positive that the property is on the person or in the place to be searched." * * *
>
> Because of the greater potential intrusion upon the privacy of persons from a nighttime search, there should be some justification for it. The positivity test of the Federal Rules of Criminal Procedure is inadequate for two reasons. First, it is essentially an unrealistic test: under what circumstances can a law enforcement officer actually be "positive" that property is in a certain place unless at the time he is applying for the warrant he is in contact with a reliable informant who is at that place? Second, even if it is assumed that a positivity requirement can be satisfied, it still permits the greater instrusion upon privacy in some cases when there is no urgent need for it. It makes better sense to limit the nighttime intrusion to those situations in which the property may not be found unless a nighttime search is permitted, that is, to maintain the same standard of certainty—probable cause to believe—but to re-

> quire the applicant to establish, and the judicial officer to find, specific justification for a nighttime search, i.e., that the property may be removed or destroyed if not seized forthwith or that the property is to be found only at nighttime. [D.C. Crime Hearings, *supra,* at p. 1404.]

Petitioner does not claim that the new test in Sections 521–523 repealed the special provisions of Section 879(a) of the United States Code applicable to narcotics searches.[27] (Indeed, the legislative history totally fails to establish the clear affirmative intent necessary to effect an implied repeal of any of the special narcotics search statutes, or of the laws authorizing the Metropolitan Police to execute federal search warrants.)[28] His claim that the validity of a nighttime search in the District of Columbia in cases involving suspected violations of the United States Code should depend on the uniform worn by the law

[27] While we agree with petitioner that the new test contained in Sections 521–523 provides greater protections for civil liberties than the old "positivity test," we note that the change was roundly condemned by those who opposed the legislation on civil libertarian grounds. D.C. Crime Hearings, *supra*, at pp. 1493, 1499, 1527.

[28] It is true that the Department of Justice erroneously informed Congress that there were no provisions in the D.C. Code relating to nighttime searches, overlooking the provisions of Title 33. However, it is sheer speculation to surmise what Congress would have done had it been aware of the special drug-related search provisions. They might have chosen to repeal them, but that would have been a conscious determination that would surely have entailed a closer look at the special circumstances surrounding searches for drugs. Implied repeal should not be founded on such a flimsy and speculative basis.

enforcement officer executing it is thus without support in legislative history of Sections 522–523.[29]

3. As we have shown, 21 U.S.C. 879(a) and Title 23 of the D.C. Code are not conflicting provisions; rather, they mesh into a logical framework of law enforcement authority and regulations applicable in different contexts. The former governs District police when enforcing federal drug laws. The latter covers their actions when acting in the capacity of local law enforcement officers in non-drug cases. However, if the Court were to perceive a lack of harmony between the provisions, Section 879(a) should be given effect over the D.C. Code provisions under basic principles of statutory interpretation.

First, "* * * when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms." Sutherland, *Statutory Construction*, § 23.17, p. 251 (4th ed., 1972). Here, although Section 879(a) went into effect prior to Title 23, the Drug Abuse Act was considered and passed after the Court Reform Act.[30] Secondly, "[t]he subsequent en-

[29] There is no claim here, nor can there be in light of 33 D.C. Code 414(h), that the local law enforcement officers deliberately specified a violation of the United States Code in their application for the warrant in order to avoid more restrictive local laws.

[30] The two statutes were considered approximately contemporaneously during the 91st Congress. The Drug Abuse Act passed the Senate on January 28, 1970, the House on September 24, 1970, and was enacted on October 27, 1970. The Court Reform Act passed the Senate on September 18, 1969, the House on March 19, 1970, and was enacted on July 29, 1970.

actment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals pro tanto the provisions of the general statute with which it irreconcilably conflicts." Sutherland, *op. cit., supra,* § 23.16, at p. 248. As the court below noted, although Title 23 is specific geographically, Section 879(a) is "clearly the more specific or 'special' provision as to *subject matter-search in narcotics cases*" (A. 28; emphasis in original).

Finally, 21 U.S.C. 903 provides that in the event of "a positive conflict between * * * this subchapter and * * * State law so that the two cannot consistently stand together," the federal law must prevail. Since 21 U.S.C. 802(24) defines the term "State," as used in the subchapter in which Section 879(a) appears, as including the District of Columbia, any conflict between Section 879(a) and 23 D.C. Code 521–523 would have to be resolved in favor of Section 879(a).

II. EVEN IF THE WARRANT FAILED TO COMPLY WITH THE APPLICABLE STATUTORY PROVISIONS FOR NIGHTTIME SEARCHES, THERE IS NO BASIS FOR THE INVOCATION OF AN EXCLUSIONARY RULE

1. The warrant and the underlying affidavit here at issue complied in all respects with the Warrant Clause of the Fourth Amendment, and petitioner does not argue otherwise. There is therefore no basis here for the application of the exclusionary rule, which "was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amednment." *Davis* v. *Mississippi,* 394 U.S. 721, 724; *United States* v. *Calandra,* No. 72–734, de-

cided January 8, 1974, slip op., p. 8. Moreover, there is likewise no exclusionary rule expressly mandated by the language of the Act of Congress that allegedly was not complied with here. Compare *Nardone* v. *United States,* 302 U.S. 379; *Lee* v. *Florida,* 392 U.S. 378, 386–387. Under these circumstances, the authority for the application of an exclusionary rule must derive from "the supervisory authority over the administration of criminal justice in the federal courts," pursuant to which this Court "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States,* 318 U.S. 332, 341.

The formulation of evidentiary rules based on this Court's supervisory powers is guided principally "by considerations of justice" (*ibid.*). This process necessarily affords substantial room for the exercise of discretion to determine whether an evidentiary rule of exclusion in a given case is essential "so as to effectuate the policy which Congress has formulated." *Nardone* v. *United States,* 308 U.S. 338, 340; *McNabb* v. *United States, supra; United States* v. *Walden,* C.A. 4, No. 72–1931, decided January 10, 1974. There is no basis for the exercise of that discretion in favor of suppression in the instant case.

2. Although a recent study has concluded that "[a]s a device for deterring illegal searches and seizures by the police, the exclusionary rule is a failure" (Oaks, *Studying The Exclusionary Rule In Search and Seizure,* 37 Chi. L. Rev. 665, 755 (1970)), we do not here challenge the assumption that an exclusionary rule

does in fact tend to encourage obedience by law enforcement officers to constitutional and statutory commands. To the extent that it serves this function, as Professor Amsterdam has written, "the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, And Section 2255: A Comment,* 112 U. Pa. L. Rev. 378, 389 (1964).[31]

Accepting the proposition that the application of an exclusionary rule does operate to deter law enforcement officers from conducting warrantless searches and seizures in instances where they desire to make evidentiary use of the items seized, it is nevertheless our submission that once authorization for the search has been obtained in good faith from a neutral and detached magistrate, and there is a defect in procedure resulting from an error of judgment on the part of the magistrate, the application of the exclusionary rule serves no deterrent function with respect to the conduct of law enforcement officers and should be eschewed.

Indeed, application of the exclusionary rule in a case such as this ignores the vital role which the magistrate is assigned and performs under the Constitution. Unlike instances in which police officers act on their own initiative, and in which an exclusionary rule is perhaps the only deterrent to misconduct, the

[31] And, indeed, even in Fourth Amendment cases, this Court has restricted "the application of the [exclusionary] rule * * * to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, slip op., at p. 10.

warrant procedure itself provides a substantial alternative barrier to unreasonable or otherwise defective searches and seizures. See *United States* v. *Lefkowitz,* 285 U.S. 452, 464; *Johnson* v. *United States,* 333 U.S. 10, 14; *Jones* v. *United States,* 362 U.S. 257, 270–271. And for that reason, this Court has recognized that not all errors of judgment by a magistrate are to be treated in the same manner as errors by law enforcement officers acting on their own initiative.

Where, for example, resort has been had to a magistrate and a search has been undertaken pursuant to his direction, the validity of the search will be judged by less exacting standards than if the law enforcement officers had acted without such authorization.[32] As Mr. Justice Goldberg observed in *Aguilar* v. *Texas,* 378 U.S. 108, 111, quoting *Jones* v. *United States,* 362 U.S. 257, 270–271:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present * * *.

[32] Presumably, but for their concern for the safety of their informant, the officers could have made a warrantless arrest of petitioner in his apartment on the evening of February 9, right after his sale of heroin to the informant. It is ironic that the problems for this prosecution arise from the election to obtain a warrant from a magistrate for a later authorization to enter his apartment.

Again, in *United States* v. *Ventresca,* 380 U.S. 102, 106, this Court, emphasizing "the preference to be accorded searches under a warrant," indicated that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail."

While we agree with the admonition in *Aguilar* that reviewing courts must still "insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp" (378 U.S. at 111), where the record clearly indicates that the magistrate has performed his function—where, in the words of Judge Friendly, there was "reasonable cause to believe there was reasonable cause" [33]—there is no necessity for the application of an exclusionary rule, particularly where the error is not of constitutional dimension. Compare, A.L.I., *A Model Code of Pre-Arraignment Procedure,* § 290.2 (Official Draft No. 1, July 15, 1972).

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[33] Speaking to this issue generally, Judge Friendly has written (Friendly, *Benchmarks*, pp. 260–261 (1967)):

"The very use of the word 'deter' suggests the analogy of the criminal law. But to achieve its end the criminal law does not usually impose punishment on one whose violation has come from mistake rather than evil motives and, at least in its modern development, it leaves latitude to the judge as to the degree of punishment to be exacted. It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be enforced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court. At least in cases of this sort, where, in contrast to confessions of dubious reliability, the evidence cannot impair any proper defense on the merits, the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or fla-

3. The record in the instant case shows that law enforcement officers, following the command of the Fourth Amendment, filed a detailed affidavit fully complying with the two-pronged test of *Spinelli* [34] and *Aguilar* [35] for establishing probable cause for a search based on information supplied by an informant. The application for a warrant was made only a short time after the adoption of 21 U.S.C. 879(a) and 23 D.C. Code 522–523, and there was every reason to justify the belief that those statutes had not imposed any additional requirements for searches conducted at night. Indeed, not only was the United States Commissioner satisfied that no further showing was required, but the United States Court of Appeals and the District of Columbia Court of Appeals subsequently confirmed that judgment. Moreover, even the district court judge who granted the motion to suppress recognized that "[t]he search warrant statutes of possible application to narcotics searches in this jurisdiction are a bramblebush of uncertainties and contradictions" (A. 21).

This case is thus wholly different from those cases in which this Court has invoked its supervisory powers to exclude relevant evidence because the application of an exclusionary rule was essential to

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grantly illegal—where there was no reasonable cause to believe there was reasonable cause." [Footnote omitted.]

See also, *United States* v. *Soyka*, 394 F. 2d 443, 452 (C.A. 2) (Friendly, C.J., dissenting from panel decision prior to rehearing *en banc* decision); *United States* v. *Edmons*, 432 F. 2d 577, 585 (C.A. 2) (Friendly, C.J.) (dictum).

[34] *Spinelli* v. *United States*, 393 U.S. 410.

[35] *Aguilar* v. *Texas*, 378 U.S. 108.

"compel respect for federal law" and to prevent federal courts from serving as "accomplice[s] in the willful transgression of the 'Laws of the United States.' " *Lee* v. *Florida,* 392 U.S. 378, 386–387; cf. *United States* v. *Calandra, supra,* slip op., at p. 17, n. 11. This is not a case of a deliberate or "willful transgression" of an Act of Congress, nor is it a case in which the law enforcement officers presented an affidavit which no reasonable magistrate could have believed satisfied the commands of the statute (as it was then understood). Most significant of all, the law enforcement officers did not act on their own initiative, but followed the procedure of "antecedent justification before a magistrate that is central to the Fourth Amendment." *Eaton* v. *Price,* 364 U.S. 263, 272 (Brennan, J., concurring).

While it may be difficult to define the circumstances under which the "deterrent efficacy" of the exclusionary rule "reaches a point of diminishing returns" and "its continued application [becomes] a public nuisance" (Amsterdam, *supra,* 112 U. Pa. L. Rev. at p. 389), it seems safe to say that this point has been reached in the circumstance where law enforcement officers conduct a search pursuant to a warrant that they have obtained in good faith from a neutral and detached magistrate. By compelling resort to a United States magistrate, the exclusionary rule has served its deterrent function. Application of the exclusionary rule where resort has been had to a magistrate would, under the circumstances of this case, be nothing short of the imposition of absolute liability on police and magistrates, to the detriment of the criminal justice system and the interests of the public.

As this Court implicitly recognized in *Jones, Aguilar,* and *Ventresca,* an exclusionary rule can never operate to prevent good-faith errors of legal judgment on the part of the magistrate or law enforcement officers. The only consequence of its application here will be to leave a seller of heroin on the street and defeat the oft-declared policy of Congress in favor of vigorous enforcement of the narcotics law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6902

LONNIE GOODING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

I.

INTRODUCTION

The government's brief raises several collateral issues which we believe are not directed to the heart of the issues before this Court.[1] Moreover, the government

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[1] The best illustration is the government's suggestion, made for the first time in this litigation, that the search, at 9:30 P.M., was not made at night. Thus, the government in effect maintains that the issues fully litigated and decided below and then submitted to this Court for resolution are not presented by the instant case. We demonstrate, *infra*, that the government's belated contention is without merit.

often mischaracterizes petitioner's position in an attempt to diffuse our arguments.

It is petitioner's position that there are only two possible statutes under which this federal narcotics search warrant could have been applied for and directed to the District of Columbia police: 21 U.S.C. §879(a) and 23 D.C. Code §§521-523. Under either statute, a special showing of necessity for nighttime execution must be made; however, such showing was not made in this case.

Section 879(a) could be held to apply because it is the U.S. Code narcotics search warrant provision, and the search in this case was for evidence of violation of the federal narcotics laws. If the search had been made by agents of the Bureau of Narcotics and Dangerous Drugs, there would be no question that §879(a) was the applicable statute. The instant search, however, was made solely by the District of Columbia police, and this fact may require the conclusion that the validity of the warrant must be tested under the general provisions in the District of Columbia Code, 23 D.C. Code §§521-523, governing nighttime searches by District police.

The government contends that the warrant here should be tested and validated under 33 D.C. Code §414.[2] However, §414 is a part of the Uniform Narcotic Drug Act[3] and has application only to searches for violations of that act. The procedures of §414 have no application to warrants for violations of the *federal* narcotics laws.

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[2] We dispute, *infra*, the government's contention that the requirements of §33-414 were satisfied. The more fundamental point, however, is that §33-414 simply has no application to the *federal* narcotics warrant at issue in this case.

[3] 33 D.C. Code §§401 *et seq.*

This is precisely what each judge below concluded on this issue (App. 29, n. 14; 40-41; 45-46).

To review: petitioner contends that, if Section 879(a) is controlling, the Court should hold that Congress introduced in 1970 a requirement of "exigent circumstances" for nighttime execution—a requirement which was not satisfied in this case. We contend alternatively that 23 D.C. Code §§521-523 are the statutory provisions governing this search, and it is conceded that the requirements of these sections were not met.[4]

II.

REPLY TO COLLATERAL ISSUES RAISED BY THE GOVERNMENT

A. This Search Made at 9:30 P.M.—Almost Four Hours After Sunset—Took Place at Night

For the first time in this lengthy litigation, the government asserts that this search (which occurred at 9:30 p.m.—almost four hours after sunset) did not occur at night (Res. Br. 19-23). This argument must fail because the common law definition of day and night applied at the time the possibly applicable search warrant statutes were promulgated,[5] and there is not a shred of statutory language nor legislative history to suggest that Congress intended to supplant the several hundred year old common law rule (sunrise-sunset) with one predicated on defining "nighttime" in terms of a specific span of hours without regard to whether light or darkness exists at the time of the search.

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[4] App. 30 & n. 15.

[5] Title 21 U.S.C. §879(a) uses the term "at any time of the day or night." Title 23 D.C. Code §521(f)(5) uses "hours of daylight" and "at any time of the day or night."

The fact that Rule 41(h) redefined daytime and nighttime for Rule 41 purposes some two years after the 1970 legislation in issue was enacted in no way supports the government's argument;[6] while the legislative history of both the Controlled Substances Act and the D.C. Court Reform Act does not expressly state that Congress intended the common law rule to be applied, it is reasonable to impute to Congress an intention to embrace the definitions of "day" and "night" then being applied by the federal courts.[7] Under even the most restrictive of the common law definitions of night, the search in this case–almost four hours after sunset–was a nighttime search. *Cf., Jones v. United States,* 357 U.S. 493 (1958).

Nowhere in its brief does the government cite a federal case by which night and day are differentiated by use of a specific span of hours such as utilized in Rule 41(h) (effective October 1, 1972). Instead it cites three cases on page 21 of its brief which are samples of the continuing controversy extending over hundreds of years as to whether day and night for purposes of search warrants are separated (1) by sunset and sunrise or (2) by the onset of such darkness that the features of a man's face or the words on the warrant cannot be seen or read by the existing natural light. That controversy does not

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[6] Judge Fahy noted that the redefinition of night contained in revised Rule 41(h) "remains for consideration with respect to search warrants issued after its effective date [October 1, 1972]." App. 42

[7] Distefano v. United States, 58 F.2d 963, 964 (5th Cir. 1932) (service of a daytime warrant more than one hour after sunset invalidates the search and requires suppression of the evidence); United States v. Martin, 33 F.2d 639 (D. Mass. 1929) (service ten minutes after sunset voids the search and requires suppression of the evidence). See also, 79 C.J.S., Searches and Seizures §83(c)(2).

affect the search in issue here which was clearly made in the nighttime.[8]

B. Title 33 D.C. Code §414 Has No Application To and Cannot Validate the Federal Narcotics Search Warrant in Issue Here; Moreover, the Procedural Requirements of Section 414 Were Not Satisfied by the Magistrate Here.

We argued in our main brief to this Court that the "D.C. Code's Uniform Narcotic Drug Act (33 D.C. Code §§401-425) plays no part here." (Pet. Br. 32, n. 45). We adhere to that position because this was a search for suspected violations of federal (U.S. Code) narcotics law; indeed, all three judges below separately concurred on this point (App. 29, n. 14; 40-41; 45-46). Alternatively, if 33 D.C. Code §414 does furnish the governing statutory procedure for this warrant, then the warrant is invalid because the magistrate (a) was not aware that §414 was the governing standard and did not make the probable cause findings required by that statute and (b) did not adhere to the prescribed procedures of §414. Indeed, the Court of Appeals held:

> "There is no showing that this requirement was met in these cases, so we will proceed on the assumption that §414 would not validate the search warrants challenged here." App. 27; see also, App. 41; 46, n. 3.

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[8] At pages 22-23, the government adverts to the New York Criminal Procedure Law which Congress was told was a model used in the drafting of §§521-523. Even assuming that the definition of day and night in the New York law could be read into §§521-523, that law defines daytime as from 6:00 a.m. to 9:00 p.m. (N.Y.C.P.L. §§690.30 & 690.35 (1971)). The search in issue here took place at 9:30 p.m.

1. *This Warrant Was Applied For And Issued Pursuant To Federal Narcotics Law; 33 D.C. Code §414 Has No Application To Such Warrants.*

The government asks this Court to transform a warrant which was issued for violations of the federal narcotics laws (26 U.S.C. §4704 (1964)) into a warrant for violations of the D.C. Code narcotics laws. Here the magistrate made findings that he had probable cause to believe violations of the United States Code were taking place. These findings cannot be transformed after the fact into findings that violations of the D.C. Code were occurring. *Cf., Thomas v. United States,* 376 F.2d 564, 567 (5th Cir. 1967).

It is axiomatic that in reviewing the establishment of probable cause, the government must stand or fall on the evidence and documents presented to the magistrate. *Aguilar v. Texas,* 378 U.S. 108, 109, n. 1 (1964). After-the-fact justifications and changes in evidentiary facts are not permitted. Here every document presented to the magistrate indicated that the police officer and prosecuting attorney believed that violations of 26 U.S.C. §4704(a) were occurring (App. 5, 6, 8, 9). After reviewing the affidavits and application, Magistrate Margolis independently determined that there was probable cause to believe that violations of 26 U.S.C. §4704(a) were occurring, and accordingly he issued a federal search warrant (App. 9-10).

At this stage of the proceeding, it is improper to make a finding that the warrant was in fact issued for alleged violations of the D.C. Code narcotics laws. That question was not presented to the magistrate, and he made no finding of probable cause that Mr. Gooding was violating

the D.C. Code;[9] the sole focus of the attention of all parties was upon the federal narcotics provisions and all judicial findings were predicted thereon. The government cites no case to support the retroactive transformation of a federal search warrant into a local search warrant.

As we have shown, the warrant here was the result of an investigation for violations of the federal narcotics laws; all portions of the application–including that signed by a prosecutor (App. 5)–reflected the suspicion that violations of federal law were taking place. Moreover, because D.C. police Officer Green developed evidence that Mr. Gooding was selling narcotics and had a record of narcotic violations (App. 8-9), the appropriate procedure was to apply for a federal warrant for violations of federal law.[10]

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[9]The government cites United States v. Averell, 296 F.Supp. 1004 (E.D.N.Y. 1969), and Ray v. United States, 10 F.2d 359 (6th Cir. 1926), in support of its argument that this warrant can be retroactively transformed from a federal warrant into a D.C. Code warrant. Those cases sustained warrants which were issued with no statutory citation thereon or with an inadvertent citation of the wrong statute. Neither of these situations is the case here. Here, the application documents and the warrant itself referred to the statute which all participants intended at the time to govern this search (26 U.S.C. §4704). They did not have the slightest intention to enforce the D.C. Code provisions with this warrant. It is only because the validity of this warrant for nighttime execution is under challenge here that government lawyers are seeking to read more into the four corners of the warrant papers than is there. The warrant can be sustained only if it satisfies the standards of 21 U.S.C. §879(a) or 23 D.C. Code §§521-523 (See Section I supra.).

[10]Testimony before Congress further indicates that the instant warrant was applied for, considered, and issued as a federal (U.S. Code) warrant. United States Attorney David G. Bress told the Senate District of Columbia Committee:

> "Minor narcotic offenders in this jurisdiction are generally dealt with as misdemeanor violators in the court of general sessions [under 33 D.C. Code §§401 *et seq.*]
>
> * * * * *
>
> "... all sellers of heroin or related drugs ... are prosecuted

Thus, as the search warrant documents reflect, all parties to the issuance of this warrant—affiant, prosecutor, and magistrate—in accordance with prosecutorial procedure viewed this search warrant as issued under and governed by federal procedure; there is no shred of documentary or other evidence suggesting that any participant had any intention of this warrant being issued under or governed by 33 D.C. Code §414. Thus, this was a federal warrant, and §33-414 is not available to sustain it.

2. *If 33 D.C. Code §414 Is Controlling Here, The Warrant Cannot Be Sustained Because The Statutory Procedures Of §414 Were Not Followed.*

The warrant in issue here was prepared using a form provided by the Administrative Office of U.S. Courts.[11] This form was designed for use with then Rule 41 of the Federal Rules of Criminal Procedure. Thus, to the extent that Rule 41 differed from §33-414, the pre-printed language on this form would not be in conformance with the D.C. Code. A comparison of the operative sections of the two provisions reveals the different procedures required:

Rule 41(c) (1971):

"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing

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under the appropriate Federal statute."

Hearings before the Committee on the District of Columbia, United States Senate, on S.2869, S.2602, and S.2980 (Part 2), 91st Cong., 1st Sess. 369, 370 (1969).

[11]Form A.O. 93 (Revised June 1964) (see original District Court record).

the grounds for issuing the warrant."

33 D.C. Code §414:

"(b) A search warrant cannot be issued but upon probable cause supported by affidavit particularly describing the property and the place to be searched.

"(c) The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

It is quite evident that the procedural requirements of §33-414 are more stringent than those of Rule 41. The warrant (App. 10-11) tracks Rule 41; it does not follow the language or the requisites of D.C. Code §33-414, and therefore the warrant is not a valid warrant under the D.C. Code. We argued this point to the Court of Appeals, and all three judges adopted it (App. 27; 29, n. 14; 41; 45-46).

Finally, the plain language of the warrant fails to make a finding mandated by §414(a). As Judge Robinson highlighted in his opinion (App. 46, n. 3), that section requires the magistrate to find probable cause to believe that narcotics are being possessed "in violation of the provisions of this chapter." Since the UNA does contain provisions authorizing certain uses and possession of narcotics, an essential element of probable cause is the suspect's not being licensed or authorized under Title 33 to possess the heroin. That finding is not made in this warrant, and, as indicated in §414(a), it is essential.

III.

THE GOVERNMENT HAS FAILED TO REPUDIATE PETITIONER'S ARGUMENT THAT SECTION 879(a) REQUIRES A FINDING OF EXIGENT CIRCUMSTANCES FOR NIGHTTIME SEARCHES.

As we indicated in the Introduction to this brief, the government's brief expresses misunderstanding of our position. For example, at pages 17 and 44 of its brief, the government states that our "principal claim is that section 879(a) is not applicable here at all." That is incorrect.

In our main brief, we made two independent, alternative arguments. The first was that assuming the applicability of 21 U.S.C. §879(a), the requirements of that section were not met. The other presumed that the controlling provisions in this case were found to be 23 D.C. Code §§521-523. Title 23 is a comprehensive set of rules for D.C. police searches not covered by other special provisions of the District of Columbia Code.

We stand on these contentions equally. If the Court determines either in petitioner's favor, it follows that the search was unlawful because the warrant in issue does not comply with the commands of either statutory provision. We find it unnecessary to reargue these contentions in this reply brief.

We note, however, that the government concedes—albeit in a conditioned fashion—that the plain language of section 879(a) requires a special showing for a nighttime search (Res. Br. 16, 36). The government represses the fact that this language was enacted—not "in a vacuum"—but as part of thoroughly considered legislation (Pet. Br. 18-28). Indeed, the very language which is at issue here was drafted by the Department of Justice.[12] We repeat what we said at page 25 of our main brief:

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[12]Indeed, the provisions of §879(a) and of §§23-521-523 were submitted to Congress and sponsored by the Department of Justice.

> "We submit that if the Department of Justice and the Congress had intended the test set forth in §1405 to continue in force as to all controlled substances, the language of §1405(1) would have been transferred intact into the new comprehensive act. This was clearly not done."

As we indicated in our main brief, we embrace fully Judge Robinson's view that section 879(a) creates an "exigent circumstances" test (Pet. Br. 26-28). We disagree with the government's statement at page 36 of its brief that petitioner and Judge Robinson are unable to agree on the meaning of section 879(a).[13] Our sole disagreement with Judge Robinson's opinion is in the application of the "exigent circumstances" standard to the warrant in issue as set forth at pages 28-31 of petitioner's main brief.[14]

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[13]On page 38 of its brief, the government quotes certain portions of Judge Robinson's opinion which if left unexplained could confuse this Court as to our position in this Court. In the Court of Appeals, we argued that because this search took place in the District of Columbia and was executed by District of Columbia police, section 879(a) should embrace the criteria of 23 D.C. Code §§521-523 for the issuance of federal narcotics search warrants. Petitioner has not advanced that argument in this Court (Pet. Br. 25-28). Our position is that the language of §879(a) creates an "exigent circumstances" test for nighttime warrants as explicated by Judge Robinson below.

[14]As a fall-back position, the government argues that if section 879(a) does not require particularized findings of exigent circumstances for nighttime search warrants, the warrant in issue nonetheless satisfies that test. (Res. Br. 39-40). We note that the government is ignoring the concession that it made to the Court of Appeals as to whether the warrant in issue satisfied §879(a)—"We do not contend that any such particularized showing was made in this case." (Gov't. Reply Br. 2, n.5). Moreover, the government's sole support for its fall-back position is the quotation without elaboration of Judge Robinson's statements on this matter.

IV.

THE EXCLUSIONARY RULE SHOULD BE APPLIED HERE TO ENFORCE THE INTENT OF CONGRESS AND TO PREVENT EVIDENCE WHICH HAS BEEN UNLAWFULLY SEIZED FROM TAINTING THE PURITY OF OUR JUDICIAL PROCESS.

A. Introduction

In Section II of its brief, the government argues that even if the warrant is invalid—which we believe it is—the evidence should not be suppressed because the warrant was applied for in good faith and because "there is a defect in procedure resulting from an error of judgment on the part of the magistrate. . . ." (Res. Br. 54). This facile and seemingly simple assertion cannot survive analysis; this Court should not condone searches performed under the authority of invalid warrants.

Analysis of the government's argument reveals its misinterpretation of the *Weeks* rationale. First, adoption of its position would negate the need to obtain a valid warrant because any defect would be explained away as a "defect in procedure resulting from an error of judgment." Such a result would impair and undermine numerous precedents requiring findings of probable cause by a neutral magistrate for each essential constitutional and statutory requisite.

The second flaw is (a) that no branch of the government would vigorously enforce the constitutional and statutory rights of the citizens and (b) that the purity of our trial justice would be tainted by permitting the government to use illegally seized evidence to convict citizens. The government ignores one of the clear holdings of *Weeks v. United States*, 232 U.S. 383 (1914): that the federal courts are not to be parties to the subversion of the public's constitutional rights by permitting tainted evidence in their courtrooms.

B. The Government's Position Would Nullify The Procedures Established By Congress.

At several places in its brief (*e.g.*, 29, n. 14; 56), the government intimates that the warrant meets the Fourth Amendment standards even though it might not meet certain statutory standards. This suggests that fundamental errors in following statutory procedure do not mandate suppression whereas fundamental errors in applying the Fourth Amendment will invoke the *Weeks* rule. In other words, violating statutory procedures should produce either no consequences or less severe consequences than deviations from Fourth Amendment requirements.

It is our position that statutory procedures are on the same footing as Constitutional procedures. A fundamental error in the application of either invalidates the warrant and has resulted in the suppression of the evidence so obtained at trial. *Aguilar v. Texas, supra; Jones v. United States, supra* at 498.[15] Indeed to hold otherwise would negate the force of statutory procedures and render them meaningless. Moreover, the populace should receive the same protection from a search with an invalid warrant regardless of the cause of the invalidity.

In addition to diminishing the force of the procedures enacted by Congress, adoption of the government's argument will undermine important cases such as *Spinelli v. United States,* 393 U.S. 410 (1969), and *Aguilar v. Texas, supra,* among others. In both of these cases, police

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[15]See also, Miller v. United States, 357 U.S. 301 (1958) (breaking into a premises without the statutorily required knock and notice of authority and purpose–evidence suppressed); Distefano v. United States, supra; United States v. Martin, supra. *Compare,* McNabb v. United States, 318 U.S. 332, 345 (1943) (Court will not "stultify" a Congressional command by not enforcing it).

officers made good faith affidavits to the magistrate, and the magistrate issued the requested warrants. However, in both of these cases, there was a "defect in procedure resulting from an error of judgment on the part of the magistrate. . . ." (Res. Br. 54). In both cases, the magistrate did not understand the requisite for probable cause to issue a search warrant, and the Court found the warrants invalid and required suppression of the evidence obtained under color thereof.

In the instant case, the police made a good faith affidavit, and the magistrate erroneously found probable cause for a nighttime execution. Magistrate Margolis' legal mistake[16] is a fundamental error such as was found in *Spinelli* and *Aguilar*. In all three cases, the paper purporting to be a warrant did not in fact give the police the authority to be in the suspect's premises at the actual time of entry.

C. This Court Should Continue To Enforce The Mandate Of *Weeks* That Federal Courts Should Not Permit Unlawfully Seized Evidence To Be Used At Trial.

The government argues in effect that the exclusionary rule is intended only to deter unlawful police conduct. This is clearly not its only Constitutional purpose.[17] This

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[16]This mistake consisted of authorizing service of this warrant at any time of the day or night without the application having shown "exigent circumstances" for execution at night; alternatively, Magistrate Margolis should not have directed nighttime execution without compliance with the provisions of D.C. Code §§521-523 pertaining to nighttime searches.

[17]". . .the *Weeks* rule is of constitutional origin." Mapp v. Ohio, 367 U.S. 643, 649 (1961).

rule compels the courts to avoid further participation in the deprivation of fundamental rights regardless of how inadvertent the initial violation of rights may have been.[18] The citizens of this country have been assured and must continue to be assured that when errors occur in the executive branch and the lowest echelons of the judiciary–which errors result in the issuance of a warrant when no warrant should have issued–the Courts will not permit the furthering of the injury.

This principle was clearly enunciated in *Weeks*:

> "In *Adams v. New York*, 192 U.S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it (*Boyd Case, supra*). To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. at 394.

The *Weeks* Court further made it clear that the Fourth Amendment required the Courts to suppress any evidence which was the fruit of a search with an unlawful warrant:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, *and to forever secure the people, their persons, houses, papers, and effects,*

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[18]United States v. Calandra, ___U.S.___ (January 8, 1974) (Dissenting opinion of Brennan, J., at 2).

against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and *the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.*

* * * * *

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, *the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.* The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. at 391-2, 393 (emphasis added). *See also, Boyd v. United States,* 116 U.S. 616, 630 (1886).

This principle was recently echoed in *Terry v. Ohio,* 392 U.S. 1, 12-13 (1968), when Chief Justice Warren wrote for the Court:

"The rule also serves another vital function—'the imperative of judicial integrity.' *Elkins v. United States,* 364 U.S. 206, 222 (1960)."[19]

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[19]We note that the majority in Calandra does not mention this vital function of Weeks. Because Calandra involved only the use of illegally seized evidence as a basis for questioning of a witness before a grand jury, there was no challenge to the integrity of trial court proceedings. Thus, we do not believe that Calandra dilutes the importance of the "judicial integrity" aspects of the Weeks rule as applied in instances such as this case.

In *Mapp v. Ohio, supra,* this Court reaffirmed the Constitutional derivation of the *Weeks*[20] rule and asserted that the exclusionary rule was essential to prevent the Fourth Amendment from being "reduced to 'a form of words.' Holmes, J., *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920)." 367 U.S. at 648.

The *Mapp* court wrote:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.
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> * * * * *
>
> "Our decision, *founded on reason and truth,* gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." 367 U.S. at 659, 660 (emphasis added).

Notwithstanding the oft-repeated multiple bases for the *Weeks* rule, the government grounds its argument solely on the deterrent theme; that is, the police here went in good faith to a magistrate who erroneously issued a warrant. While there is controversy as to whether the

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[20]Because of its Constitutional base, the exclusionary rule is not merely the product of this Court's supervisory functions (Res. Br. 53). Rather it is required by the Constitution in instances where illegally seized evidence is sought to be introduced in evidence at trial against the victim of the search. While the rule was obviously created by the judiciary, it has far more permanence and stature than a mere rule of evidence established at the discretion of the Court. This rule was established as a protection to the victims of unlawful searches and seizures. Weeks, supra.

exclusionary rule deters unlawful searches,[21] neither of the government's scholarly authorities advocates tampering with the exclusionary rule now. D.H. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi.L.Rev. 665 (1970); A.G. Amsterdam, *Search, Seizure, and Section 2255,* 112 U.Pa.L.Rev. 378 (1964). (Res. Br. 53-54).

Professor Oaks does conclude from his empirical research that the exclusionary rule as a deterrent is a failure although he does comment that in the District of Columbia the sanction of the rule is not remote in terms of time from the officers who applied for and executed the warrant.[22]

Notwithstanding his empirical findings, he states:

> "The exclusionary rule cannot be replaced as long as it remains a constitutional requirement." (*Id.* at 753)

Indeed, Professor Oaks *does not* advocate tampering with the rule at this time:

> "Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. *If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation.* It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence." (*Id.* at 756, emphasis added).

Thus, any restriction of the exclusionary rule must follow meaningful legislation giving a sure

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[21]See, e.g., United States v. Calandra, supra, slip op. at 9, n. 5.

[22]37 U.Chi.L.Rev. at 688-89.

remedy to the victims of searches performed under the color of a warrant.

Professor Amsterdam also favors retention of the *Weeks* rule in the trial court:

> "I do not mean to revivify here the entire exclusionary rule debate. *Weeks* has long since settled the basic issue in the federal courts—*rightly I believe.*
>
> * * * * *
>
> "... [*Weeks*] sole rational justification is the experience of its indispensability in 'exerting general legal pressures to secure obediance to the Fourth Amendment on the part of federal law-enforcing officers.' As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed [*i.e.* with respect to §2255 motions] than is needed to combat the disease." 112 U. Pa. L. Rev. at 388-89 (citation omitted).

The government cites *United States v. Calandra, supra,* in support of its argument for contraction of the existing coverage of the exclusionary rule. We do not believe that *Calandra* stands for contraction, and it is therefore not applicable to this case.

Mr. Justice Powell, after his discussion of the exclusionary rule, begins Part IV of the opinion by saying:

> "In deciding whether to extend the exclusionary rule to grand jury proceedings. . . ." Slip op. at 11.

Clearly the issue there was whether the *Weeks* rule should be extended to unlawfully obtained evidence used as the basis for questioning of witnesses before a grand jury.

There is nothing in the *Calandra* opinion to suggest that the exclusionary rule will be contracted in its application upon illegally seized evidence used at trial against the person from whom it was seized. Rather Mr. Justice Powell appeared to affirm the rule's continuing validity in situations such as presented here:

> "Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Weeks v. United States,* 232 U.S. 383 (1914); *Mapp v. Ohio,* 367 U.S. 643 (1961)." Slip op. at 8-9.

Accordingly, *Calandra* does not support the government's proposition that the *Weeks* rule's present application should be contracted. Because the *Weeks* rule has been applied in the past to suppress evidence which was seized under color of a statutorily defective warrant,[23] no extension of the rule is needed here, and *Weeks* should continue to be applied to this case.[24]

Respectfully submitted,

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February 1974

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[23] See for example, Miller v. United States, supra; Distefano v. United States, supra; compare, Jones v. United States, supra.

[24] This Court has also recognized that the exclusionary rule is essential to maintaining our system of government and liberties. Any relaxation of the rule will necessarily place the rights of citizens on a level lower than the interests or convenience of government officers. This Court should not bow to the transitory unpopularity of the exclusionary rule. As the Court said in Miller v. United States, supra at 313:

> "[I]nsistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."

GOODING *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-6902. Argued February 25, 1974—Decided April 29, 1974

Petitioner, charged with illegal possession of drugs, made a motion to suppress the physical evidence seized in petitioner's apartment on February 12, 1971, at 9:30 p. m. by District of Columbia police officers pursuant to a Magistrate's search warrant. Although no provisions of the D. C. Code were explicitly referred to, petitioner apparently contended, *inter alia*, that the warrant was executed in the nighttime in violation of D. C. Code § 23-521 *et seq.*, which specifically requires that search warrants be served in the daytime unless certain statutory conditions are met, none of which was satisfied here. The District Court granted petitioner's motion, rejecting the Government's contention that the warrant was issued under 21 U. S. C. § 879 (a), which relates only to searches for "controlled substances" and provides that a warrant may be served "at any time of the day or night" as long as the issuing authority is satisfied that probable cause exists to believe that there are grounds for the warrant "and for its service at such time." The Court of Appeals reversed on the ground that 21 U. S. C. § 879 (a) was the applicable statute and that its terms had been satisfied. *Held:*

1. Title 21 U. S. C. § 879 (a), which is part of a comprehensive federal scheme for the control of drug abuse, applies to this case. Pp. 446-454.

(a) The standards for issuance of the warrant should be governed by nationwide federal legislation rather than by local D. C. laws. An Assistant United States Attorney filed the application for the warrant with a Federal Magistrate, alleging violations of the United States Code for which petitioner was indicted. P. 447.

(b) Though the affiant officer and the officers executing the warrant were D. C. police, rather than federal officers, and the legislative history of § 879 (a) stressed federal enforcement, Congress manifested no purpose to dispense with the aid of other enforcement personnel in dealing with the narcotics problem. Pp. 447-450.

(c) If petitioner's contention were to prevail, the general search warrant statute applicable to the District of Columbia would govern D. C. police officers when investigating federal drug violations but not other federal crimes, despite the fact that D. C. police officers historically played a prominent role in federal drug enforcement under 18 U. S. C. § 1405 (1964 ed.), the predecessor statute of 21 U. S. C. § 879 (a). Pp. 450–454.

2. Title 21 U. S. C. § 879 (a), as was true of its predecessor statute, requires no special showing for a nighttime search, other than a showing, such as was made here, that the contraband is likely to be on the property or person to be searched at that time. Pp. 454–458.

155 U. S. App. D. C. 259, 477 F. 2d 428, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 459. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 461.

Herbert A. Rosenthal, by appointment of the Court, 414 U. S. 998, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Edward R. Korman*, and *Jerome M. Feit*.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner in this case presents a claim that evidence offered against him at his trial should have been suppressed because it was seized at nighttime in violation of governing statutory provisions. The search which led to the seizure was conducted by officers of the District of Columbia Metropolitan Police Department at approximately 9:30 p. m. within the District of Columbia.

Armed with a search warrant, the officers entered petitioner's apartment for the purpose of discovering violations of a federal narcotics statute, and seized a substantial amount of contraband narcotics. The parties urge upon us differing theories concerning which federal or District of Columbia statute bears on the legality of this search, and we must therefore interpret and reconcile several recent congressional enactments dealing with nighttime searches which seem to embody somewhat inconsistent views.[1]

The Court of Appeals agreed with the District Court's description of this congeries of statutes as a " 'bramble-bush of uncertainties and contradictions,' "[2] and a mere summary of the statutes attests to the accuracy of that observation:

District of Columbia Statutes: The older of the two conceivably relevant District of Columbia statutes, D. C. Code § 33–414 (1973),[3] was enacted in 1956 and authorizes

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[1] The Government contends that even though we were to determine that the applicable statutory provision was violated in this case, the evidence should nonetheless not be suppressed. Since we conclude that the seizure was consistent with the governing statute, we have no occasion to reach this alternative argument.

[2] See 155 U. S. App. D. C. 259, 261, 477 F. 2d 428, 430 (1973), quoting from 328 F. Supp. 1005, 1008 (DC 1971).

[3] "§ 33–414. Search warrants—Requirements—Form—Contents—Return—Penalty for interfering with service.

"(a) A search warrant may be issued by any judge of the Superior Court of the District of Columbia or by a United States commissioner for the District of Columbia when any narcotic drugs are manufactured, possessed, controlled, sold, prescribed, administered, dispensed, or compounded, in violation of the provisions of this chapter, and any such narcotic drugs and any other property designed for use in connection with such unlawful manufacturing, possession, controlling, selling, prescribing, administering, dispensing, or compounding, may be seized thereunder, and shall be subject to such disposition as the court may make thereof and such narcotic

search warrants for violations of the District of Columbia narcotics laws. This section does not limit the time during which searches may be made, stating plainly that "[t]he judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night." This liberal time provision is in direct contrast to the more restrictive provisions of the second

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drugs may be taken on the warrant from any house or other place in which they are concealed.

"(b) A search warrant cannot be issued but upon probable cause supported by affidavit particularly describing the property and the place to be searched.

"(c) The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"(d) The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"(e) If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him, to the major and superintendent of police of the District of Columbia or any member of the Metropolitan police department, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the place named for the property specified and to bring it before the judge or commissioner.

"(f) A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

"(g) The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

"(h) The judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night."

District of Columbia statute to be considered, D. C. Code § 23–521 *et seq.*,[4] which specifically requires that search warrants be served in the daytime unless certain con-

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[4] "§ 23–521. Nature and issuance of search warrants

"(a) Under circumstances described in this subchapter, a judicial officer may issue a search warrant upon application of a law enforcement officer or prosecutor. A warrant may authorize a search to be conducted anywhere in the District of Columbia and may be executed pursuant to its terms.

"(b) A search warrant may direct a search of any or all of the following:

"(1) one or more designated or described places or premises;

"(2) one or more designated or described vehicles;

"(3) one or more designated or described physical objects; or

"(4) designated persons.

"(c) A search warrant may direct the seizure of designated property or kinds of property, and the seizure may include, to such extent as is reasonable under all the circumstances, taking physical or other impressions, or performing chemical, scientific, or other tests or experiments of, from, or upon designated premises, vehicles, or objects.

"(d) Property is subject to seizure pursuant to a search warrant if there is probable cause to believe that it—

"(1) is stolen or embezzled;

"(2) is contraband or otherwise illegally possessed;

"(3) has been used or is possessed for the purpose of being used, or is designed or intended to be used, to commit or conceal the commission of a criminal offense; or

"(4) constitutes evidence of or tends to demonstrate the commission of an offense or the identity of a person participating in the commission of an offense.

"(e) A search warrant may be addressed to a specific law enforcement officer or to any classification of officers of the Metropolitan Police Department of the District of Columbia or other agency authorized to make arrests or execute process in the District of Columbia.

"(f) A search warrant shall contain—

"(1) the name of the issuing court, the name and signature of the issuing judicial officer, and the date of issuance;

"(2) if the warrant is addressed to a specific officer, the name of

ditions set forth in § 23–522 (c)(1) are met. These conditions essentially require a showing of special need to search at night, and concededly have not been satisfied in this case.

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that officer, otherwise, the classifications of officers to whom the warrant is addressed;

"(3) a designation of the premises, vehicles, objects, or persons to be searched, sufficient for certainty of identification;

"(4) a description of the property whose seizure is the object of the warrant;

"(5) a direction that the warrant be executed during the hours of daylight or, where the judicial officer has found cause therefor, including one of the grounds set forth in section 23–522 (c)(1), an authorization for execution at any time of day or night;

"(6) where the judicial officer has found cause therefor, including one of the grounds set forth in subparagraph (A), (B), or (D) of section 23–591 (c)(2), an authorization that the executing officer may break and enter the dwelling house or other building or vehicles to be searched without giving notice of his identity and purpose; and

"(7) a direction that the warrant and an inventory of any property seized pursuant thereto be returned to the court on the next court day after its execution.

"§ 23–522. Applications for search warrants

"(a) Each application for a search warrant shall be made in writing upon oath or affirmation to a judicial officer.

"(b) Each application shall include—

"(1) the name and title of the applicant;

"(2) a statement that there is probable cause to believe that property of a kind or character described in section 23–521 (d) is likely to be found in a designated premise, in a designated vehicle or subject, or upon designated persons;

"(3) allegations of fact supporting such statement; and

"(4) a request that the judicial officer issue a search warrant directing a search for and seizure of the property in question.

"The applicant may also submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

"(c) The application may also contain—

"(1) a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable

Federal Statutes and Rules: The general provision governing federal search warrants is found in Fed. Rule Crim. Proc. 41.[5] At the time the search in this case

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cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances; and

"(2) a request that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions set forth in subparagraph (A), (B), or (D) of section 23–591 (c)(2) is likely to exist at the time and place at which such warrant is to be executed.

"Any request made pursuant to this subsection must be accompanied and supported by allegations of fact supporting such request."

[5] At the time of the search in this case Rule 41 read, in part, as follows:

"Search and Seizure

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

"(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

"(c) Issuance and contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer

took place, Rule 41 (c) provided that warrants must be served in the daytime except where "the affidavits are positive that the property is on the person or in the place to be searched."[6] In such event the war-

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of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

. . . . .

"(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

[6] Rule 41 has since been amended to read, in part:

"(a) Authority to issue warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

"(b) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

"(c) Issuance and contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and

rant could direct "that it be served at any time." This provision was incorporated in the rules in 1948 as a replacement for language previously contained in the Espionage Act of 1917.[7] A second federal statute relating only to searches for "controlled substances" is found in 21 U. S. C. § 879 (a),[8] which was enacted in

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naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

. . . . .

"(h) Scope and definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers and any other tangible objects. The term 'daytime' is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time. The phrase 'federal law enforcement officer' is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54 (c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

[7] § 10, 40 Stat. 229.

[8] "21 U. S. C. § 879. Search warrants.

"(a) A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the

1970. That section provides that a warrant may be served "at any time of the day or night" so long as the issuing authority "is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." This provision in turn is the successor to a provision in 18 U. S. C. § 1405 [9] (1964 ed.), enacted in 1956 to relax the "positivity" test of Rule 41 in cases involving certain narcotic drugs.[10] Congress had passed this statute in response to the complaints of law enforcement officers that the positivity requirement gave commercial narcotics dealers a definite advantage over federal agents. Rule 41 is therefore not applicable to searches governed by the more specific narcotic search statutes.[11]

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judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

[9] "§ 1405. Issuance of search warrants—procedure.

"In any case involving a violation of any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code, a violation of subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or a violation of the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a)—

"(1) a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist, and

"(2) a search warrant may be directed to any officer of the Metropolitan Police of the District of Columbia authorized to enforce or assist in enforcing a violation of any of such provisions."

[10] See, *e. g.*, H. R. Rep. No. 2546, 84th Cong., 2d Sess., 16 (1956).

[11] See, *e. g.*, *United States* v. *Stallings*, 413 F. 2d 200 (CA7), cert. denied, 396 U. S. 972 (1969); *United States* v. *Castle*, 213 F. Supp. 52 (DC 1962).

Our Brother MARSHALL in his dissenting opinion stresses Congress' continuing concern for individual privacy, as demonstrated by the

The facts of this case must be understood in the context of these statutes. On February 11, 1971, an Assistant United States Attorney applied to a United States Magistrate sitting in the District of Columbia for a warrant authorizing a search of petitioner's apartment for evidence of illegal narcotics. The application included the brief notation: "Violation: U. S. C.; Title 26. Sections: 4704a." In connection with the application, an officer of the Metropolitan Police Department vice squad appeared before the Magistrate and swore that he had reason to believe petitioner was concealing property held in violation of that same code provision.[12]

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limitations on nighttime searches contained in the Espionage Act, *supra*, and later, Fed. Rule Crim. Proc 41. The implication seems to be that this concern must be read into the provisions of 21 U. S. C. § 879 (a) to reach the interpretation for which he argues. But this argument totally ignores the fact that Congress, in 1956, enacted a statute governing searches for dangerous drugs which deliberately removed the stricter limitations on night searches found in Rule 41. Our construction of the principal statute considered in this case, 21 U. S. C. § 879 (a), therefore, represents no novel departure from previous congressional policy in this area, but is, on the contrary, consistent with the conceded meaning of the statute which governed federal drug searches for almost 15 years.

[12] The affidavit read in full:

"BEFORE Lawrence S. Margolis, Wash., D. C. The undersigned being duly sworn deposes and says:

"That he (has reason to believe) that (on the premises known as) 1419 Chapin Street, N. W., as you enter the building last apartment on the right next to the elevator on the first floor Washington in the District of Columbia there is now being concealed certain property, namely heroin, syringes, tourniquets, cookers and paraphernalia used in the preparation of heroin for retail and any other paraphernalia used in the preparation and dispensation of heroin and any other narcotic drugs illegally held, which are in violation of Title 26 U. S. Code Section 4704 (a).

"And that the facts tending to establish the foregoing grounds

The officer supplemented his personal testimony with a written affidavit, outlining the basis for the application in more detail and alleging specifically that "illegal drugs are sold and possessed in violation of the United States Code, Title 26, Section 4704a." [13] The affidavit concluded with the language: "I am positive that Lonnie Gooding is secreting narcotics inside his apartment at 1419 Chapin Street NW in violation of the US Code."

The Magistrate then issued a warrant directing the Chief of Police or "any member of MPDC" to search petitioner's apartment.[14] The warrant specifically noted

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for issuance of a Search Warrant are as follows: See the facts set forth in the affidavit attached hereto and made a part hereof.

/s/ Marion L. Green
MARION L. GREEN
MPD"

[13] The affidavit states specifically:

"I, the undersigned officer who is assigned to the Third District Vice Squad, Metropolitan Police Department, and working in the City of Washington, D. C. in an undercover capacity where illegal drugs are sold and possessed in violation of the United States Code, Title 26, Section 4704a. Had the occasion to investigate the following offense."

[14] The warrant read in its entirety:

"To Chief of Police or any Member of MPDC

"Affidavit having been made before me by Plc. Marrion [*sic*] L. Green, Jr. Third District Vice Squad that he (has reason to believe) that (on the premises known as) 1419 Chapin Street, N. W., as you enter the building last apartment on the right next to the elevator on the first floor, Washington in the District of Columbia, there is now being concealed certain property, namely heroin, capsules, envelopes, syringes, tourniquets, cookers and paraphernalia used in the preparation of heroin for distribution or use and any other instrumentalities or evidence of illegal possession or dispensation of heroin or of any other narcotic drugs illegally held. See the facts set forth in the affidavit attached hereto and made a part hereof which are in violation of Title 26 Section 4704 (a) of the U. S. Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above

that facts had been set forth in an affidavit alleging a violation of 26 U. S. C. § 4704 (a) (1964 ed.) and that those facts established probable cause to make the search. The warrant also stated that the search could be made "at any time in the day or night." This phrase was accompanied by a footnote reference to Fed. Rule Crim. Proc. 41 (c), presumably because the police officer had asserted he was "positive" the drugs were in petitioner's apartment. One of the briefs filed in this case suggests that the warrant form was preprinted and contemplated application of Rule 41 standards.[15]

The search warrant was executed on February 12, 1971, at 9:30 p. m.[16] The officers engaged in the search were

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described and that the foregoing grounds for application for issuance of the search warrant exist.

"*You are hereby commanded* to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day or night [1]) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

"Dated this day of Feb. 11, 1971

/s/ Lawrence S. Margolis
U. S. Commissioner"

"[1] The Federal Rules of Criminal Procedure provide: 'The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time.' (Rule 41C)."

[15] Reply Brief for Petitioner 8.

[16] The Government contends in its brief, apparently for the first time in the course of this litigation, that the search was not in fact a nighttime search. The primary basis for this argument is revised Fed. Rule Crim. Proc. 41 which states that "[t]he term 'daytime' is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time." See n. 6, *supra*. In view of our conclusion

all members of the District of Columbia Metropolitan Police Department, and the search uncovered a substantial quantity of contraband narcotic materials. They were seized and formed the basis for charging petitioner with violations of 26 U. S. C. § 4704 (a) (1964 ed.) [17] and 21 U. S. C. § 174 (1964 ed.).[18] Following his indictment in the United States District Court for the District of Columbia on April 6, 1971, petitioner filed a motion to suppress the evidence discovered in the February 12 search.

Several grounds were asserted in support of the motion, particularly that "[t]he search warrant was executed at night but the application for the warrant did not comply with the D. C. Code provisions for nighttime search

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that the standards for a nighttime as well as a daytime search under 21 U. S. C. § 879 (a) were met in this case, we do not need to resolve this issue.

[17] "§ 4704. Packages.

"(a) General requirement.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

[18] "§ 174. Same; penalty; evidence.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000."

warrants . . . ." [19] Although no provisions of the D. C. Code were explicitly referred to, petitioner's argument apparently was that Title 23 of the D. C. Code, requiring that a special showing of need be made to justify a search at night, governed this search, and that its requirements had not been met. The District Court found this reasoning persuasive and granted the motion to suppress. Rejecting the Government's argument that the warrant was not issued under Title 23 but rather under 21 U. S. C. § 879 (a), the court stated:

> "Whatever be the standards generally for issuance of a nighttime search warrant in federal narcotics cases in other parts of the country, however, the Court finds that the existence of 21 U. S. C. § 879 (a) does not remove such cases from the explicit requirements for search warrants in the District of Columbia under the newly enacted Title 23, D. C. Code." [20]

Having decided that District of Columbia law applied, the District Court admitted to some uncertainty about the status of D. C. Code § 33–414, the provision dealing specifically with violations of local drug laws. The court noted with some puzzlement that no mention of this provision was found in the legislative history of Title 23, and that some language in the legislative history suggested that the provision had simply been overlooked.[21] Nevertheless, the court determined that

"[p]ending prompt review of this determination

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[19] Petitioner also contended that the officers entered the apartment without knocking and without having a "no-knock" warrant and that the police had no probable cause to search him. Neither court below passed upon the sufficiency of these contentions, and they are not before us here.

[20] 328 F. Supp., at 1007.

[21] *Id.*, at 1008 n. 1.

> or congressional action, and pending interpretation of 33 D. C. Code § 414 (h) in light of the new Title 23 provisions, search warrants which are to be executed in the nighttime should comply in all respects with 23 D. C. Code § 523 (b)." [22]

Concededly the warrant issued in this case did not comply with the requirements of Title 23.

The Court of Appeals for the District of Columbia Circuit reversed the District Court,[23] although none of the three judges who composed the panel completely agreed with any other on the proper rationale. All three agreed, however, that 21 U. S. C. § 879 (a), rather than any provision of the District of Columbia Code, was the provision which determined the legality of this search. All three likewise agreed that the affidavit submitted by the District of Columbia police officer satisfied the requirements of that section. Judge Wilkey and Judge Fahy found that no greater showing for a nighttime search was required by § 879 (a) than was required by its predecessor statute governing federal narcotics searches, 18 U. S. C. § 1405 (1964 ed.), and that the affidavit need establish only probable cause to believe that the property would be on the premises at the time of the search.[24] Judge Robinson believed that § 879 (a)

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[22] *Id.*, at 1008.

[23] 155 U. S. App. D. C. 259, 477 F. 2d 428 (1973).

[24] Judge Wilkey stated in his opinion: "We hold that the applicable statute, 21 U. S. C. § 879 (a), requires only a showing of probable cause to believe that the narcotics will be found on the premises at any time of the day or night." *Id.*, at 266, 477 F. 2d, at 435. Judge Fahy in his opinion stated: "Thus, in the case of narcotics, previously under Section 1405 (1) and later under Section 879 (a), if the judge was satisfied 'that there is probable cause to believe' rather than 'if the affidavits are positive' that the 'property is on the person or in the place to be searched,' the warrant could permit execution at any time." *Id.*, at 268, 477 F. 2d, at 437.

did require an additional showing for a nighttime search, but concluded that such a showing had been made in this case.[25]

Petitioner urges that we reverse the Court of Appeals on either or both of two alternative grounds. First, petitioner repeats his assertion, sustained by the District Court, that Title 23 of the D. C. Code is the statute applicable to the search in this case and that, as the Government has conceded, the requirements of that title have not been satisfied. Second, petitioner argues that, if 21 U. S. C. § 879 (a) is considered to be the applicable provision, a special showing for nighttime searches must be made. We agree with the Court of Appeals that 21 U. S. C. § 879 (a) is the statute applicable to this case, and that its provisions have been satisfied here.[26]

I

The unique situation of the District of Columbia, for which Congress legislates both specially and as a part

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[25] Judge Robinson concluded: "The test of reasonable cause for nighttime execution does not demand a demonstration that drugs are positively on the premises at night, or that they could be found on the premises only at night, or that for some reason a search would be impossible in the daytime. It does summon some factual basis for a prudent conclusion that the greater intrusiveness of nighttime execution of the warrant is justified by the exigencies of the situation." *Id.*, at 274, 477 F. 2d, at 443. Judge Robinson then went on to find that a proper showing had been made in this case. He stated: "Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated." *Id.*, at 275, 477 F. 2d, at 444.

[26] We are therefore not required to reach the Government's argument that, despite the fact that the application for the search warrant alleged a violation of the U. S. Code, the search could be justified under D. C. Code § 33–414 as a search for violations of local drug laws.

of the Nation, gives rise to the principal difficulties in this case. For we deal here not with statutory schemes enacted by independent legislative bodies, but with possibly overlapping schemes enacted by a single body. Despite the potential overlap, however, we think that the operative facts surrounding this search strongly indicate that the standards for issuance of a warrant should be governed by the nationwide federal legislation enacted by Congress—that is, 21 U. S. C. § 879 (a) [27]—rather than by the local D. C. laws. To begin with, an Assistant United States Attorney, who had discretion to proceed either under federal or under local law, filed the application for the search warrant alleging a violation of the United States Code. Application was made to a United States Magistrate, located in the United States District Court building, and neither the application nor the supporting affidavits contained any mention of the local narcotics laws. After the materials were seized, petitioner was indicted for violations of federal law.

Petitioner contends, however, that Title 23 of the D. C. Code should apply to this case because the executing officers, as well as the officer swearing to the affidavit presented to the Magistrate, were not federal officers but officers of the District of Columbia Metropolitan Police Department. He argues that the provisions of 21 U. S. C. § 879 (a) were intended to apply solely to agents of the Bureau of Narcotics and Dangerous Drugs, none of whom were involved here, whereas Title 23 of the D. C. Code was intended to provide comprehensive regulation of District of Columbia police officers investigating both local and federal offenses. Petitioner reinforces his argument by noting that the former federal statute

[27] The provisions of 21 U. S. C. § 879 (a) prevail over the provisions of Fed. Rule Crim. Proc. 41 when controlled substances are involved. See nn. 10 and 11, *supra*.

regulating drug searches specifically provided that "a search warrant may be directed to any officer of the Metropolitan Police of the District of Columbia authorized to enforce or assist in enforcing a violation of any of such provisions," [28] while no such section appears in 21 U. S. C. § 879. Therefore, says petitioner, the District of Columbia police were no longer to be considered federal agents for the purpose of enforcing federal drug laws.

Although petitioner's arguments cannot be dismissed lightly, we find them ultimately unpersuasive. Concededly there are hints in the statutory framework and legislative history of the Controlled Substances Act, 84 Stat. 1242, that indicate the policing function under those provisions would be the primary responsibility of the Bureau of Narcotics and Dangerous Drugs.[29] But this focus on the Bureau's role seems entirely natural in view of one of the Act's stated purposes to "collect the diverse drug

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[28] See n. 9, *supra*.

[29] For example, John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, stated at the Hearings on Drug Abuse Control Amendments—1970 before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91–45, pt. 1, p. 86 (1970), that the no-knock provision, incorporated in § 702 (b) of the proposed bill, see n. 32, *infra*, would grant authority "restricted to special agents of the Bureau of Narcotics and Dangerous Drugs." In addition, the preceding provision of the bill set forth expanded powers for the agents of the BNDD. However, although these excerpts would argue for petitioner's position here, we believe that the Government's position ultimately proves to be stronger. We believe for the reasons stated in the text that the emphasis on the powers of the BNDD agents was not intended to remove powers from other federal agents who had previously assisted in the enforcement of federal drug laws. See also 18 U. S. C. §§ 3052, 3053, and 3056, setting forth arrest powers for agents of the Federal Bureau of Investigation, United States marshals, and secret service agents.

control and enforcement laws under one piece of legislation to facilitate law enforcement, drug research, educational and related control facilities." [30] In providing a comprehensive federal scheme for the control of drug abuse, Congress could be expected to pay special attention to the federal agency set up to enforce the laws. But this attention does not mean that Congress at the same time wished to dispense with the aid of other enforcement personnel who had previously given assistance.

The failure of Congress to include a special provision authorizing District of Columbia police officers to obtain search warrants for investigating federal offenses cannot be taken as a deliberate exclusion in view of the overall statutory framework. The provision included in the previous federal statute may well have seemed unnecessary, both in light of the history of cooperation between the District of Columbia police and federal officers and in view of the provisions of D. C. Code § 4–138 providing that "[a]ny warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force . . . ." [31] Thus, both custom and statute already assured the availability of District of Columbia police. Furthermore, the legislative history relating to § 879 (a) stresses the need for stronger enforcement of the federal narcotics laws, a goal hardly advanced by reducing the forces available to execute those laws. In fact, the provision

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[30] S. Rep. No. 91–613, p. 3 (1969).

[31] D. C. Code § 4–138 provides:

"Any warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force, without any backing or indorsement of the warrant, and according to the terms thereof; and all provisions of law in relation to bail in the District shall apply to this chapter."

See *Thomas* v. *United States*, 409 U. S. 992, 993 (1973) (DOUGLAS, J., dissenting).

which is now § 879 (b), permitting "no-knock" searches under certain conditions, was one of the most controversial sections of the entire bill, and was defended primarily by the pressing need for added enforcement weapons to combat the increased drug traffic.[32]

Finally, the interpretation urged by petitioner would leave District of Columbia officers able to execute general federal search warrants under amended Fed. Rule Crim. Proc. 41, but deny them that authority under the federal drug search statute. Rule 41 now provides that "a federal law enforcement officer"—defined in the Rule to include "any category of officers authorized by the Attorney General to request the issuance of a search warrant"—may make applications under the Rule. The Attorney General has since listed the Metropolitan Police Department among those agencies

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[32] "§ 879. Search warrants.

"(b) Any officer authorized to execute a search warrant relating to offenses involving controlled substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States magistrate issuing the warrant (1) is satisfied that there is probable cause to believe that (A) the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and (2) has included in the warrant a direction that the officer executing it shall not be required to give such notice. Any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises."

See H. R. Rep. No. 91-1444, p. 25 (1970), which stated:

"The purpose of this provision [the no-knock provision], as explained in the hearings, is to provide law enforcement officials with a tool to aid in combatting the illicit traffic in drugs which has proved helpful in all of the 29 States where this authority exists either by statute or common law."

which are so authorized.[33] If petitioner's contention were accepted, it would seemingly mean that the general search warrant statute applicable to the District of Columbia would govern District of Columbia police officers investigating federal drug cases, but would not govern them when investigating other federal crimes. This result would obtain despite the fact that District of Columbia police officers historically played a prominent role in the enforcement of federal drug laws under 18 U. S. C. § 1405 (1964 ed.).

There is little indication that Title 23 of the D. C. Code was intended to serve the sweeping purpose which petitioner attributes to it.[34] The search warrant provisions upon which petitioner relies were part of the Court Reform Act, which substantially reorganized the District of Columbia court system, providing for a new local court of general jurisdiction and relieving the United States District Court for the District of Columbia of much of its local burden.[35] Prior to that time all local felonies had been tried in the United States District Court, and the Federal Rules of Criminal Procedure by their terms had applied. The creation of the new Superior Court created the need for a new set of pro-

[33] See Atty. Gen. Order 510–73, 38 Fed. Reg. 7244–7245.

[34] The effect of Title 23 on other statutes was debated in some detail below. Judge Wilkey in his opinion noted that the provisions of 21 U. S. C. § 879 (a) were not only enacted after the provisions of Title 23 (although they took effect sooner), but also are more specific in terms of subject matter, *i. e.*, drug control. 155 U. S. App. D. C., at 262, 477 F. 2d, at 431. Thus, as a matter of statutory construction, it is somewhat difficult to see how Title 23 was intended to modify any later, more specific statute. Petitioner no longer suggests that Title 23 must be read into the provisions of 21 U. S. C. § 879 (a). He contends either that Title 23 is applicable in its entirety or that § 879 (a) by its own terms requires a special showing for searches at night.

[35] D. C. Code § 11–901.

cedural rules, and, though some important changes were made, the new rules quite closely tracked the Federal Rules. It does not seem unreasonable, therefore, to suggest that the general provision relating to search warrants, found in D. C. Code § 23–521 *et seq.* and then incorporated in similar form into the rules [36] promulgated

[36] "Rule 41. Search and Seizure.

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the Superior Court.

"(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize property. Property is subject to seizure pursuant to a search warrant if there is probable cause to believe that it (1) is stolen or embezzled; or (2) is contraband or otherwise illegally possessed; or (3) has been used or is possessed for the purpose of being used, or is designed or intended to be used, to commit or conceal the commission of an offense; or (4) constitutes evidence of or tends to demonstrate the commission of an offense or the identity of a person participating in the commission of an offense.

"(c) Application for Search Warrants. Each application for a search warrant shall be made in writing upon oath to a judge of the Superior Court. Each application shall include the name and title of the applicant; a statement that there is probable cause to believe that property described in paragraph (b) as subject to seizure is likely to be found in a designated premise, in a designated vehicle or object, or upon designated persons; allegations of fact supporting such statement; and a request that the judge issue a search warrant directing a search for and seizure of the property in question. The applicant may also submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

"The application may also contain (1) a request that the search warrant be made executable at any hour of the day or night, upon the ground that (i) there is probable cause to believe that it cannot be executed during the hours of daylight, or (ii) the property sought is likely to be removed or destroyed if not seized forthwith, or (iii) the property sought is not likely to be found except at certain times or in certain circumstances; and (2) a request approved by an appropriate prosecutor that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings

Feb. 1, 1971, for the new Superior Court, was intended to be a counterpart to Fed. Rule Crim. Proc. 41. The federal rule, as discussed *infra*, did not apply to narcotics cases in the federal courts since more specific provisions, first of 18 U. S. C. § 1405 (1964 ed.) and then of 21 U. S. C. § 879 (a), controlled.[37]

This conclusion is reinforced by the fact that federal Rule 41 has been subsequently modified to more closely resemble the District of Columbia statute and rule. The new federal rule, though less specific than the local rule, provides that a search warrant must be issued in the daytime, "unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime," and abandons the old, cumbersome positivity standard. The concern for individual privacy revealed in the provisions of the District of Columbia search statute may thus be found in the new federal rule as well, but Congress, as it had in the earlier version of the rule,

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or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions listed in subparagraphs (a), (b), or (d) of D. C. Code § 23–591 (c) (2) is likely to exist at the time and place at which such warrant is to be executed whereby the applicant may dispense with such requirement. Any request that a search warrant be executable at any time of the day or night or that a search warrant authorize the executing officer to break and enter without a prior announcement of his identity and purpose must be accompanied and supported by allegations of fact supporting such request." Effective Oct. 25, 1973, paragraph (b) of this rule was amended. Paragraphs (a) and (c) were unchanged.

[37] We note that the District of Columbia Court of Appeals has indicated that the specific provisions of Title 33 are not qualified by the more general provisions of Title 23 in searches for violations of the local drug laws in the District of Columbia. See *United States* v. *Thomas*, 294 A. 2d 164, 167–168, cert. denied, 409 U. S. 992 (1973).

nevertheless showed its clear intention to leave intact other special search warrant provisions, including, of course, the provisions relating to searches for controlled substances.[38] In those limited cases Congress has considered the need for privacy to be counterbalanced by the public need for more effective law enforcement. We do not believe that Congress, by enacting a general search warrant provision for the District of Columbia, has struck a different balance in federal drug cases simply because District of Columbia police officers are involved.

We therefore conclude, as did all the judges of the Court of Appeals, that the statute applicable to this case is 21 U. S. C. § 879 (a). Our remaining task is to determine whether the requirements of that section have been met.

II

> "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." 21 U. S. C. § 879 (a).

Only the last seven words of the statute are really in controversy here. Petitioner contends that this language, not found in the predecessor statute, 18 U. S. C. § 1405 (1964 ed.), was intended to require some special showing of need for searches conducted at night rather than during the day. His contention was adopted, at least in part, by Judge Robinson in the Court of Appeals. The Government, on the other hand, contends that it must show only probable cause to believe that the

[38] See Fed. Rule Crim. Proc. 41 (h), *supra*, n. 6. See also subsection (g) of prior Rule 41, n. 5, *supra*.

sought-after property will be on the premises at the time of the search, and that if there is probable cause to believe the property will be on the premises at night, such a showing sufficiently meets the requirement imposed by the last seven words of § 879 (a).

The language of the statute by itself is not crystal clear on this issue. Petitioner insists that the last phrase requires with unmistakable clarity a separate finding of probable cause to justify a nighttime search. Thus, according to petitioner, the issuing magistrate would have to satisfy himself that there was not only probable cause for the search, but also probable cause for believing that the search should be conducted at nighttime rather than during the daytime. While this is a possible meaning, it is by no means the only possible meaning attributable to the words.

Petitioner's interpretation really assumes that the statute reads: "There is probable cause to believe that grounds exist for the warrant and, *if served at night*, for its service at such time." But the statute does not include the italicized four words; it makes no distinction whatever between day and night, and literally read would apparently require that a special showing be made for a daytime search as well. The idea that a particularized showing must be made for searches in the daytime is completely novel and lacks even a single counterpart in other search statutes enacted by Congress.

Petitioner suggests that since Congress was concerned about the greater intrusion resulting from nighttime searches, it would be logical to apply the language, "probable cause . . . for its service at such time," only to nighttime searches. But even this interpretation, which is by no means a literal reading of the language, is not wholly convincing. The traditional limitation placed on nighttime searches, as evident from the earlier

language of Rule 41, is to require, not that there be probable cause for searching at night, but that the affiant be *positive* that the property is in fact located on the property to be searched. Thus Congress' very choice of the words "probable cause" would indicate that the earlier limitation of "positivity" was not to apply, while offering no other immediately ascertainable standard for what should constitute "probable cause" for executing a search warrant during the night.

This roundabout way of limiting nighttime searches, if that were in fact the statute's intent, would sharply contrast with the manner in which Congress has required special showings for nighttime searches in other statutes. For example, Title 23 of the D. C. Code, discussed *supra*, specifies that the warrant "be executed *during the hours of daylight*" (emphasis added) unless certain itemized conditions are met. Federal Rule Crim. Proc. 41, as amended in 1972, states: "The warrant *shall be served in the daytime* unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Emphasis added.) The fact that Congress, when it has intended to require such special showings for nighttime searches, has done so in language largely free from ambiguity militates against petitioner's assertion that the language of § 879 (a) on its face supports his position.

The legislative history lends no support to petitioner's interpretation, but in fact cuts the other way. Both the House and the Senate Committee Reports on the bill incorporated a summary prepared by the Department of Justice, where much of the bill's drafting had taken place, which stated:

> "Section 702 (a) [now § 879 (a)] incorporates 18 U. S. C. [§] 1405 and authorizes service of a search

> warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U. S. magistrate issuing the warrant." [39]

As previously noted, § 1405 provided that a search warrant could be served at any time of the day or night so long as the issuing officer was "satisfied that there is probable cause to believe that the grounds for the application exist . . . ." Case law had uniformly interpreted the language to mean that probable cause for the warrant itself was all that was necessary for a nighttime search.[40] The officers or agents simply had to establish probable cause for believing that the sought-after property would be found in the place to be searched.

There is no suggestion in any of the hearings or debates before Congress that a change from the prior law in this area was intended. The provision itself went unmentioned in the debates and hearings on the bill, a surprising omission if the bill effected the cutback petitioner says it did. Of like import is the fact that in the long and heated discussions over § 702 (b), the so-called "no-knock" provision of the bill, no defender of the bill saw fit to argue that any greater intrusion caused by the no-knock provision would be partially offset by the greater difficulty in obtaining warrants executable at night.[41] While congressional silence as to a particular provision of a bill during debates which give extensive consideration to neighboring provisions is not easy to interpret, it would be unusual for such a significant

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[39] S. Rep. No. 91–613, pp. 30–31 (1969). See also H. R. Rep. No. 91–1444, pt. 1, p. 54 (1970).

[40] See n. 11, *supra*.

[41] The debates on this controversial proposal may be found generally in volume 116 of the Congressional Record. See, *e. g.*, 116 Cong. Rec. 1159–1162, 1164–1177, 33639–33645.

change as that proposed by petitioner to have entirely escaped notice.

Finally, it is important to note that the Department of Justice itself submitted this bill to Congress for enactment, including § 879 (a) in its present form. Since the hearings and debates stress that a major purpose of the bill was to supply more effective enforcement tools to combat the increasing use of narcotic drugs, it seems totally illogical to suggest that the Department of Justice would submit a bill making it substantially more difficult to control the traffic in hard drugs. Petitioner suggests that this surrender was necessary to convince Congress to bring additional drugs within the Controlled Substances Act, but that theory rests entirely on speculation. There is absolutely no indication in the legislative history that any price had to be paid for what was thought to be a much-desired reorganization and expansion of the drug laws, much less the substantial price that petitioner argues had to be paid here.

We therefore conclude that 21 U. S. C. § 879 (a) requires no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at that time.[42] We believe that the showing was met in this case. The affidavit submitted by the District of Columbia police officer suggested that there was a continuing traffic of drugs from petitioner's apartment, and a prior purchase through an informer had confirmed that drugs were available. This was sufficient to satisfy 21 U. S. C. § 879 (a). The judgment of the Court of Appeals for the District of Columbia Circuit is

Affirmed.

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[42] We note that the Court of Appeals for the Fifth Circuit has recently reached the same conclusion. See *United States* v. *Thomas*, 489 F. 2d 664 (1973).

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The petitioner is charged with possession of heroin and narcotics paraphernalia in violation of 21 U. S. C. § 174 (1964 ed.) and 26 U. S. C. § 4704 (a) (1964 ed.). He moved the District Court to suppress certain evidence seized from his home pursuant to a search warrant secured by and directed to the Metropolitan Police Department of the District of Columbia. The District Court granted the suppression motion on the ground that the search was conducted at night in violation of D. C. Code §§ 23–521–523 (1973) which limit search warrant execution to daylight hours absent specific contrary authorization founded upon the judicial officer's determination

> "that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances . . . ." D. C. Code § 23–522 (c)(1).[1]

Though the warrant here directed a search "at any time in the day or night," none of the grounds set forth in § 522 (c)(1) were contained in either the application or the warrant itself. The police obtained the warrant on February 11, 1971, but they failed to execute it during the day of February 12, waiting instead until 9:30 p. m. on that date. Since they delayed execution until well after the daylight hours had ended,

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[1] D. C. Code § 23–523 (b) directs that all search warrants are to be executed only during daylight hours, absent express authorization pursuant to D. C. Code § 23–521 (f). Section 521 (f)(5) allows authorization for nighttime execution where the "judicial officer has found cause therefor, including one of the grounds set forth in section 23–522 (c)(1) . . . ."

the seizure was invalid if governed by D. C. Code §§ 23–521–523.

The Court holds, however, that the D. C. Code provisions are inapplicable and that the search is governed by 21 U. S. C. § 879 (a). That section became effective October 27, 1970, as part of the Controlled Substances Act, 84 Stat. 1242, 21 U. S. C. § 801 *et seq.*; it relates to search warrants issued in connection with offenses involving controlled substances. The D. C. Code provisions, however, became effective February 11, 1971, as part of the District of Columbia Court Reform and Criminal Procedure Act. The Act did not distinguish between local and federal prosecutions in its procedural innovations.[2] The purpose of the restriction upon nighttime searches was to limit such intrusions to those instances where there is "some justification for it,"[3] thus implementing the "policy generally disfavoring nighttime executions, nighttime intrusions, more charactertistic of a 'police state' lacking in the respect for due process and the right of privacy dictated by the U. S. Constitution and history . . . ."[4]

Approximately 60% of the search warrants issued in the District of Columbia relate to narcotics violations. Congress was aware of this, and, if it had intended to except federal narcotics search warrants from the protections against unnecessary nighttime "police state" searches, one would expect an expression of such intent. I agree with Judge Gesell that no such intent is indicated.

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[2] Thus various rules are applicable in the United States District Court for the District of Columbia which are not applicable in district courts elsewhere in the country. See, *e. g.*, D. C. Code § 23-1322, dealing with detention prior to trial.

[3] Hearings on Crime in the National Capital before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess., pt. 4, p. 1404 (1969).

[4] S. Rep. No. 91–538, p. 12 (1969).

Thus, "[w]hatever be the standards generally for issuance of a nighttime search warrant in federal narcotics cases in other parts of the country . . . the existence of 21 U. S. C. § 879 (a) does not remove such cases from the explicit requirements for search warrants in the District of Columbia under the newly enacted Title 23, D. C. Code." 328 F. Supp. 1005, 1007. I would reverse the Court of Appeals and sustain the District Court's suppression order.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I agree with my Brother DOUGLAS that the provisions of the District of Columbia Code requiring a showing of need for execution of a search warrant at night govern the search involved in this case, and accordingly, I join in his dissenting opinion. A majority of the Court, however, rejects this argument and goes on to discuss the standards imposed by 21 U. S. C. § 879 (a) upon issuance of search warrants for nighttime execution in federal narcotics cases. Obviously, the Court's interpretation of § 879 (a) is of far greater significance, of national rather than purely local concern. I cannot let the Court's construction of § 879 (a) pass without registering my dissent on this issue as well.

The opinion of the Court, it seems to me, analyzes the § 879 (a) issue in a vacuum, without any discussion of some of the important policy considerations which underlie this question of statutory interpretation. Perhaps a partial vacuum would be a more appropriate description, since the Court is obviously fully cognizant of the substantial governmental interest in enforcement of the narcotics laws, an interest which its interpretation of § 879 (a) so well serves. But plainly there are other concerns implicated in our interpretation of this con-

gressional enactment restricting the issuance of search warrants—the protection of individual privacy which is the very purpose of the statute's search warrant requirement and which of course is given constitutional recognition in the Fourth Amendment. The Court seems totally oblivious to these constitutional considerations. Taking them into account, I find that the only acceptable interpretation of the statute is one which requires some additional justification for authorizing a nighttime search over and above the ordinary showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found upon the search.

Fundamentally at issue in this case is the extent of the protection which we will all enjoy from police intrusion into the privacy of our homes during the middle of the night. The Fourth Amendment was intended to protect our reasonable expectations of privacy from unjustified governmental intrusion. *Katz* v. *United States*, 389 U. S. 347, 360–362 (1967) (Harlan, J., concurring). In my view, there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night. The idea of the police unnecessarily forcing their way into the home in the middle of the night—frequently, in narcotics cases, without knocking and announcing their purpose—rousing the residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings does indeed smack of a "'police state' lacking in the respect for . . . the right of privacy dictated by the U. S. Constitution." S. Rep. No. 91–538, p. 12 (1969). The public outrage at the series of mistaken nighttime raids by narcotics agents in Collinsville, Illinois, last

April, see N. Y. Times, Apr. 29, 1973, p. 1, col. 5; N. Y. Times, Apr. 30, 1973, p. 30, col. 1, serves to emphasize just how inconsistent with our constitutional guarantees such nighttime searches are.

This Court has consistently recognized that the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater than that produced by an ordinary search. Mr. Justice Harlan observed in holding a nighttime search unconstitutional in *Jones* v. *United States,* 357 U. S. 493, 498 (1958): "[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home." In *Coolidge* v. *New Hampshire,* 403 U. S. 443, 477 (1971), the Court again recognized that a midnight entry into a home was an "extremely serious intrusion." And our decision in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), was in large part based upon our revulsion at the thought of nighttime searches of the marital bedroom to discover evidence of illegal contraceptive use. See *id.,* at 485–486.

It is small wonder, then, that Congress has consistently required more stringent justification for nighttime searches than that needed to authorize a search during the day. The first congressional enactment setting out comprehensive search warrant procedures, § 10 of Title XI of the Espionage Act of 1917, 40 Stat. 217, 229, 18 U. S. C. § 620 (1940 ed.), required that the affiant must be "positive" that the property to be seized was on the premises to justify a nighttime search. When the provisions of the Espionage Act were replaced by the Federal Rules of Criminal Procedure in 1946, this requirement of positivity was carried forward in Rule 41. Despite the stringency of this requirement, it remained with us until very recently, until the 1972 amendments to Rule 41. And although the rule was then modified to require

"reasonable cause" for nighttime execution of a warrant, significantly the amended rule retained the principle that nighttime searches require an additional showing of justification over and above probable cause. Congress has also manifested its concern for protection of individual privacy against nighttime searches in its legislation for the District of Columbia, as MR. JUSTICE DOUGLAS' opinion amply demonstrates with respect to enactment of the D. C. Court Reform and Criminal Procedure Act in 1970. *Ante*, at 460.[1]

The strong policy underlying these congressional enactments is clear. As even the Government in this case concedes, "searches conducted in the middle of the night . . . involve a greater intrusion than ordinary searches and therefore require a greater justification." Brief for United States 14. In my view, this principle may well be a constitutional imperative. It is by now established Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches. In *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), after holding that search warrants were required to authorize administrative inspections, we held that the quantum of probable cause required for issuance of an inspection warrant must be determined in part by the reasonableness of the proposed search. As MR. JUSTICE WHITE stated, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.*, at 536–537. The Court in *Camara* thus approved the issu-

[1] Similarly, most of the States' laws provide that search warrants may only be served during the day unless express authorization for a nighttime search is obtained, and such authorization can generally be obtained only by meeting special requirements for a nighttime search. See L. Hall, Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 259 (3d ed. 1969).

ance of area inspection warrants in part because such searches "involve a relatively limited invasion of the urban citizen's privacy." *Id.*, at 537. See also *Terry* v. *Ohio*, 392 U. S. 1, 20–21 (1968); *Couch* v. *United States*, 409 U. S. 322, 349 n. 6 (1973) (MARSHALL, J., dissenting). I do not regard this principle as a one-way street, to be used only to water down the requirement of probable cause when necessary to authorize governmental intrusions. In some situations—and the search of a private home during nighttime would seem to be a paradigm example—this principle requires a showing of additional justification for a search over and above the ordinary showing of probable cause. Cf. *Stanford* v. *Texas*, 379 U. S. 476, 485–486 (1965).

Of course, this constitutional question is not presented in this case and need not be resolved here. But the long history of congressional authorization of nighttime searches only upon a showing of additional justification, the strong constitutionally based policy which these statutes implement, and the substantial constitutional question posed by the majority's interpretation of § 879 (a) are surely relevant to the question of statutory interpretation with which we are faced. Viewed against this background, I think it is plain that the majority's interpretation of the statute should be rejected.

Section 879 (a) provides that search warrants may be executed at night only if "there is probable cause to believe that grounds exist for the warrant and for its service at such time." It seems to me quite clear that the statute, on its face, imposes two distinct requirements: that there be probable cause for the issuance of the warrant, and that there be cause "for its service at such time." While the Court relies on legislative history which suggests that § 879 (a) merely "incorporates" the provisions of its predecessor, 18 U. S. C. § 1405 (1964 ed.), the plain

fact is that § 879 (a) does far more than this: it also adds to the language of § 1405 the final clause—"and for its service at such time"—which is at the heart of the dispute in this case. I can see no plausible interpretation of this final clause other than that it imposes an additional requirement of justification for a search at night over and above a showing of probable cause.

The Court, while conceding this to be a "possible" meaning of the statute's final clause, argues that "it is by no means the only possible meaning attributable to the words." *Ante*, at 455. Unfortunately, the Court then fails to come forward with any alternative interpretation of these final words of § 879 (a). Instead, the Court simply reads the disputed language out of the statute entirely, and decrees that the statute shall be interpreted as if it were not there. The Court holds that the statute requires only "a showing that the contraband is likely to be on the property or person to be searched at that time" to justify nighttime execution of a search warrant. *Ante*, at 458. But the showing of probable cause required for issuance of any warrant necessarily includes a showing that the objects to be seized will probably be found on the premises at the time of the search. See *Sgro* v. *United States*, 287 U. S. 206, 210–211 (1932); *Schoeneman* v. *United States*, 115 U. S. App. D. C. 110, 113, 317 F. 2d 173, 176–177 (1963); *Rosencranz* v. *United States*, 356 F. 2d 310, 315–318 (CA1 1966). This requirement is clearly imposed by the Fourth Amendment itself. It is also clearly mandated by the first part of the statutory language, which merely incorporates the constitutional requirement of probable cause for issuance of the warrant. The majority's interpretation of the statute thus leaves the final clause of § 879 (a)—the language in controversy here—totally without meaning. See *United States* v. *Thomas*, 294 A. 2d 164, 170 (DC Ct. App.)

(Kelly, J., dissenting), cert. denied, 409 U. S. 992 (1972); *United States* v. *Gooding*, 155 U. S. App. D. C. 259, 273, 477 F. 2d 428, 442 (1973) (Robinson, J., concurring in result). I cannot subscribe to such an evisceration of the statute.[2]

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[2] In an effort to conjure up ambiguity in the statutory language, the Court argues that the statute could have been drawn with more precision, and specifically points out that read literally, the statutory requirement of cause "for its service at such time" would seem to apply to daytime searches as well as those conducted at night. *Ante*, at 455–456. I readily agree that the statute could have been more artfully drafted, but the fact that it could have been stated in different words hardly justifies disregarding the plain meaning of the statutory language with which we must deal. It ill suits the Court to suggest that this language is ambiguous when the Court is unable to come forward with any plausible alternative construction.

The Court's suggestion that the statute is ambiguous because it could be literally applied to daytime searches as well as those during the night is wholly insubstantial. As the Court well knows, no one has ever proposed that an additional burden of justification for daytime searches is necessary or appropriate; in sharp contrast, the Congress has consistently acted to protect nighttime privacy through such an additional burden on nighttime searches. The Court's confusion arises only because the words "at such time" in the statute logically refer back to its authorization of service "at any time of the day or night." But this latter phrase has consistently been used in congressional enactments as a shorthand expression for a warrant whose service at night is authorized, see *e. g.*, D. C. Code § 33–414 (h), *ante*, at 433 n. 3; D. C. Code §§ 23–521 (f)(5), 522 (c)(1), *ante*, at 435 n. 4; cf. former Fed. Rule Crim. Proc. 41 (c), *ante*, at 437 n. 5, to distinguish such a warrant from any other warrant, which may be served only in the day. Plainly the statute's requirement of cause "for its service at such time" was intended to apply only to nighttime execution of search warrants.

As for the Court's complaint that a requirement of cause for nighttime service of a warrant is not the "traditional limitation" imposed upon nighttime searches, it should suffice to point out that Congress became aware in its consideration of the D. C. Court Reform and Criminal Procedure Act in 1969 that a requirement of cause would provide *greater* protection for nighttime privacy than the old posi-

The Court bases its holding upon the meager recorded legislative history of § 879 (a). But when the language of a statute is as clear and unambiguous as it is here, it is neither helpful nor appropriate to look to its legislative history. *Ex parte Collett*, 337 U. S. 55, 61 (1949); *United States* v. *Oregon*, 366 U. S. 643, 648 (1961). While committee reports in particular are often a helpful guide to the meaning of ambiguous statutory language, even they must be disregarded if inconsistent with the plain language of the statute. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89 (1935); *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245, 253–254 (1929). It is the language of the statute, as enacted by the Congress, that is the law of the land, not the language of a committee report which may or may not represent accurately the views of the hundreds of other legislators who voted for the bill.

In any event, even if resort to examination of the legislative history were appropriate here, I do not find it nearly so conclusive as does the majority of the Court. The Court relies on a single brief statement on § 879 (a) in the committee report stating that the statute merely incorporated the provisions of § 1405, which had been construed not to impose any requirement for a nighttime search warrant over and above probable cause. Yet this statement fails to provide any explanation for the language which Congress added to § 1405, the language

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tivity test, by eliminating unnecessary nighttime searches regardless of how sure police were of their basis for the search. See Hearings on Crime in the National Capital before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess., pt. 4, p. 1404 (1969); Brief for United States 49–50. This change was therefore incorporated into the D. C. Code, see D. C. Code §§ 23–521–523. It was also adopted in the 1972 amendment to Rule 41. It would hardly be surprising for the Congress to introduce a modification along the same lines into § 879 (a).

in controversy here. As to the meaning—or, as the Court would have it, the lack of meaning—of this language, the Court relies basically upon the law enforcement goals of the Department of Justice and the silence of Congress. But, as we have frequently warned, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946); see H. M. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1395–1398 (tent. ed. 1958), and cases there cited. The Court in effect presumes from Congress' failure to explain the meaning of the final clause of § 879 (a) its acquiescence in the Justice Department's apparent view that this language in fact serves no purpose.

I would presume the contrary. Congress' consistent protection of nighttime privacy by imposing restrictions upon the availability of warrants for nighttime searches reinforces the unambiguous statutory language. Both lead me to the conclusion that the final clause of § 879 (a) must be viewed as another congressional manifestation of its strong policy against nighttime intrusions into the home. I do not think that this interpretation is at all inconsistent with the narcotics law enforcement objectives which were the principal focus of this legislation. The requirement that cause be shown for the necessity of a nighttime search is still a substantial easing of the requirement of positivity which was then embodied in Rule 41, and which would otherwise have applied to many of the searches now covered by § 879 (a). I respectfully dissent.